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Heidi Marie Tauscher

Welcoming Islam:
American Law, Citizenship, and Minority Religions

By

Heidi Marie Tauscher
Doctor of Philosophy

_____	_____
Elizabeth M. Bounds, Ph.D. Adviser	Abdullahi Ahmed An-Na`im, Ph.D. Adviser
_____	_____
James W. Fowler, III, Ph.D. Committee Member	Richard C. Martin, Ph.D. Committee Member
_____	_____
Laurie L. Patton, Ph.D. Committee Member	Edward Queen, J.D., Ph.D. Committee Member
_____	
Steven M. Tipton, Ph.D. Committee Member	

Accepted by

_____
Lisa A. Tedesco, Ph.D.
Dean of the Graduate School

_____
Date

Graduate Division of Religion
Ethics & Society Program

2008

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Heidi Marie Tauscher
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J.D., Wake Forest University, 1985
M. Div., Emory University 2002

Advisors: Elizabeth M. Bounds, Ph.D. & Abdullahi Ahmed An-Na`im, Ph.D.

Committee: James W. Fowler, III, Ph.D.; Richard C. Martin, Ph.D.; Laurie L. Patton, Ph.D.
Edward Queen, J.D., Ph.D.; Steven M. Tipton, Ph.D.

An Abstract of
A dissertation submitted to the Faculty of the Graduate School
of Emory University in partial fulfillment
of the requirements for the degree of
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Ethics & Society

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ABSTRACT

This dissertation examines Muslims as the latest in a long line of minority religious communities that have legally challenged existing U.S. social practices and thereby, broadened American citizenship understandings. This interdisciplinary study constitutes a creative investigation of interactions between religious minority challenges, cultural negotiations, legislative reactions, U.S. Supreme Court decisions, and communal interpretations which have allowed the diverse Abrahamic faiths access to U.S. citizenship. In the process, it analyzes the unfolding elements and central aims of U.S. citizenship emphasizing the implications for Islam in the United States. From theoretical analysis of the historic record, a new model of citizenship is developed and a public policy of welcome is advocated.

Current Muslim American legal challenges to national security policy are placed within the context of key U.S. Supreme Court cases addressing Protestant Evangelical, Roman Catholic, and Orthodox Jewish adaptations to the United States. Attention is paid to the Supreme Court's role in our pluralistic, secular society as both mediator of legal conflicts and arbiter of social values. Then, the normative weight of public reaction is examined. These events reveal the complex interactions and intersecting meanings of the distinct citizenship ideals recently advocated by John Rawls, Michael Walzer, Alasdair MacIntyre, Iris Marion Young, William Kymlicka, and Seyla Benhabib. It is the contention of the author that American ideals of citizenship best integrate and balance all of these meanings.

Through theoretical review of historic legal events, a unique model of unfolding American citizenship is developed. It relates the elements of rights, duty, membership, and participation to U.S. policies both of conforming assimilation and empowering integration. In conclusion, the author advocates a public policy of welcoming Muslim Americans which embraces their diversity and undergirds local interfaith efforts. Such policy is claimed to motivate Muslim American allegiance, encourage civic friendship, and further the common good.

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PREFACE

Dissolving the legal vestiges of racism and discrimination in U.S. immigration policy, the Immigration Act of 1965 opened the promise of American citizenship to countless numbers of refugees from the countries of Asia and the Middle East. As a result, the United States experienced its greatest human influx since the 1850's. Just as earlier immigration brought vast numbers of Catholics to our shores, the recent surge has introduced unprecedented numbers of Muslims to our land. And as before, the country struggles to absorb this new wave of immigrants while most citizens tolerantly accepted the newcomer's unfamiliar Islamic faith. True, some have voiced fears of the Islamic impact on society and others have uttered discriminatory epitaphs, but tolerance has been the response of the vast majority of U.S. citizens who were generally unaware of growing Muslim numbers and elsewhere occupied with more pressing concerns.

On September 11, 2001, the reprehensible violent acts of one small cell of professed Islamic terrorists stunned the citizens of the United States as well as the people of the world. Quickly, the American public's quiet tolerance changed to open expressions of fear and led to active governmental attempts to control the country's Muslim population asserting national security concerns. By then, conservative estimates counted 1.9 to 2.8 million Muslims in the U.S.A. while mosques claimed 6 to 7 million were present.[1] Yet, the American people were just becoming aware of the vast numbers of Muslims within their midst.

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[1] Formerly of the National Opinion Research Center at The University of Chicago, Tom Smith's estimate of 1.9 to 2.8 million Muslims in the U.S. received much attention when made in a 2001 report to the American Jewish Committee Report. However, Ihsan Bagby, Paul Perl, and Bryan Froehle's Mosque Study Project disputes that report. Their estimate that 6 to 7 million Muslims in the U.S. has been viewed as more accurate because it is based upon direct surveys of regular mosque attendance. *See* Ilyas Ba-Ynus and Kassim Kone, "Muslim Americans: A Demographic Report," *Muslims' Place in the American Public Square: Hope, Fears, and Aspirations*, Z. H. Buhari, S.S. Nyang, M. Ahmad, and J.L. Esposito (Walnut Creek, CA: AltaMira Press 2004), pp. 299-322, at pp. 303-304, 320.

As the events of that morning unfolded, I was blissfully unaware of what was happening. Along with five hundred other Atlantans, I was attending the First Interfaith Children's Sabbath which a group of us had organized to raise awareness and support for youth issues among the city's faith communities. As terrorists boarded planes bent on destruction, Atlanta's Muslims joined with citizens of other faith communities in good will and support for the common interest in our children's welfare.

As the first plane struck New York's Twin Towers, Atlanta's Imam Plemon El-Amin, Father Henry Gratz, Reverend Luther Smith, and Rabbi Alvin Sugarman led people of all faiths in prayer for our children's future. Not until we left that assembly did any of us learn of the tragic events occurring in Washington and New York. And what we soon discovered filled us with fear and trepidation, for we knew that in those few hours the world had profoundly changed. Yet, we remained convinced that our best hope of dealing with this terrible crisis was to stand together as people of faith and as U.S. citizens.

With the flurry of activity and reaction to the events of September 11th, I began to feel a deep sense of *deja vu*. As a Catholic and a lawyer, I sensed that my own faith's religious history in the United States was being strangely repeated through the national treatment of Muslims in the wake of 9/11. Like previous generations of Catholics, the political loyalty of Muslims was under suspicion. As before with Catholics, the Muslim capacity for American citizenship was now being questioned. It occurred to me that Muslims were facing what other religious groups had experienced in the past: fear and discrimination, majority domination and secularization, and pressures to assimilate. Perhaps revisiting historic treatment of religious minorities and renewing awareness of successful integration would allow us to appreciate the struggles that these faith

communities endure. It also might remind us of the opportunities for renewal of the common good which they bring to American citizenship. From this insight and purpose, the present dissertation grew.

Contemplating the nature and scope of this study, I realized that exploring key court decisions judging the historic accommodations reached by America's Protestant Evangelicals,[2] Roman Catholics and Jews (other U.S. minority "religions of the book"[3]) might be helpful. As in the past, the dialectic of resistance and accommodation between American citizenship and minority religious identity promises to play out through the mediation of the U.S. court system. So, careful analysis of U.S. Supreme Court rulings on the key accommodation vehicles chosen by other minority "religions of the book" and how those decisions affected the dialectical tension forming each into a uniquely American faith community and shaping U.S. citizenship, may prove valuable for American Muslims. Coupled with empirical evidence, methodological models, and socio-historical analysis, such a study promises unique insights into the interactions of American citizenship ideals and minority faith traditions. Illuminating patterns of this interplay may provide direction for future public policies and support institutional changes that protect religious freedom and cultural expression while fostering shared

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[2] "Sect" is a voluntary religious group sociologically defined as holding both exclusive views and emphasizing separation from the world, in opposition to churches. Donald K. McKim, Westminster Dictionary of Theological Terms (Louisville, KY: Westminster John Knox Press 1996), p. 252. Regarding the "religiomoral character" of legal institutions and their "interpretive task" as moral architects for the collective *see* Robert Bellah and Philip E. Hammond, *The Varieties of Civil Religion* (San Francisco: Harper & Row 1980), Chapter 6.

[3] "Religions of the Book" is a Muslim characterization of the three Abrahamic faiths referenced in the Qu'ran including verses 3.9, 5.15, 5.19, 5.59, but the label is often contested by the leaders of other faith traditions as reflected in paragraph 108 of the *Catechism of the Catholic Church* (New York: Doubleday 2d.ed. 1997), p. 37:

> "Still, the Christian faith is not a 'religion of the book.' Christianity is the religion of the 'Word' of God, a word which is 'not a written and mute word, but the Word which is incarnate and living.' If the Scriptures are not to remain a dead letter, Christ, the eternal Word of the living God, must, through the Holy Spirit, 'open [our] minds to understand the Scriptures.'"

values of moral understanding and social cohesion. At the very least, this study offers a means for understanding current American fears about difference and pressures for conformity. Only such perspective allows the strengths inherent in citizen diversity and the contributions of divergent religious traditions to be appreciated and welcomed as normative resources for U.S. society.

This dissertation is offered in hopes that it presents some context and perspective about Muslim Americans' ongoing efforts to adapt to their social context and their reception by U.S. society, especially since September 11, 2001. I approach this subject not as a specialist in Islam, but as an American attorney academically trained in religion and social ethics. My sensitivity to the challenges facing Muslim Americans arises not only out of my U.S. legal training and esteem for the First Amendment, but also from personal family history associated with the past religious and social struggles of Catholics in America. For this reason, I believe that a study of other minority religious histories in the U.S. might help us contextualize and appreciate the current situation faced by our Muslim citizens. Further, such an undertaking might also inspire greater appreciation for the many gifts and resources which Muslim Americans offer to our society and present for renewal of our democratic ideals.

The title: "Welcoming Islam: American Law, Citizenship, and Minority Religions" represents the fusion of these interests. "Welcoming" is a theological principle of hospitality richly defined and emphatically encouraged of faithful believers by most religious traditions, including the three explored herein – Judaism, Christianity, and Islam.[4] Further, welcome is a secular convention of greeting which represents a strong foundation for the American norm of civic friendship. It is this positive ideal of

[4] *See* Appendix I – Supporting Theologies.

citizenship that this dissertation emphasizes, supports, and extends to all residents of the U.S., especially Muslims who currently bear the brunt of events perpetrated by a tiny number of terrorists.

Chapter 1: Introduction

Today, the United States is home to roughly six million Muslim men, women, and children. Over half of these numbers are converts to Islam, the majority of whom are African-Americans.[5] They are a diverse group, including both indigenous people and foreign immigrants. Together, Muslims struggle to define their relationship to U.S. society as well as to one another. At the same time, their fellow Americans must decide how they will receive this varied group who share such a distinct religious heritage. History discloses that the America which prides itself on religious freedom and welcoming diversity has too often witnessed discriminatory treatment of those from marginalized faiths. Yet, distinctly American ideals and norms of citizenship offer guidelines not only for addressing ethnic and religious discrimination, but also for enabling active participation that welcomes the newcomer and encourages voluntary integration of the immigrant.[6] Likewise, religious faiths such as Islam possess tenets that not only define the exclusive boundaries of their own faith community, but can also be interpreted to inclusively embrace the larger society in which their followers reside.[7]

As American history demonstrates, Islam is merely the latest in a long line of minority religious communities that have significantly challenged existing U.S. social practices and thereby, broadened American citizenship understandings. The interaction of religious morals and civic values constitutes the dialectical tension continually shaping religious

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[5] Jocelyne Cesari, *When Islam and Democracy Meet* (New York: Palgrave MacMillan 2004), pp. 10-11.
[6] Throughout U.S. history, ideals of citizenship including equality, justice, and tolerance have been distinctly combined with active modes of civic participation through voluntary associations. It was in the context of these voluntary associations that American citizens traditionally learned practical citizenship skills that allowed them to become "co-creators of history." *See* Alexis De Toqueville, *Democracy in America* (Chicago: University Of Chicago Press 2002), pp. 57, 60, 153. Robert N. Bellah, Steve Tipton, et. al., *Habits of the Heart* (Berkeley, CA : University of California Press 1996) pp. 167, 223-223.
[7] *See* Appendix I: Supporting Theologies.

traditions and citizenship norms into distinctly American forms. And, as in the past, these American ideals are working concurrently to shape Islam and Muslim communities in the United States.

This interactive process is understandable in light of the country's constitutional foundation. From the beginning, the United States has been a country of diverse immigrants and indigenous peoples possessing a multitude of beliefs and held together by a liberal civic order. Many refugees were fleeing religious persecution or political oppression, and so placed a high value on individual autonomy and personal liberty. For these principles, they were not only willing to cross an ocean, but to fight for independence. In winning the Revolutionary War, the former British colonists cast off foreign political rule. After a brief experiment with loosely centralized state self-governance under the Articles of Confederation, the new American citizens adopted the U.S. Constitution creating a national federated republic on the condition that a Bill of Rights guaranteed individual liberties.

The U.S. Constitution and Bill of Rights not only prohibited government establishment of religion and guaranteed free religious exercise, but affirmed the Declaration of Independence's attestation that all citizens were created equal and endowed with inalienable rights. Thus, the Constitution protected diversity of religious practice from government regulation. Under its authority, citizenship was granted on a secular basis and religious tests for public office were banned.[8] The U. S. Founders determined that the nation would be ruled by laws rather than by church dictate. Morality was defined by civic virtue rather than religious piety, by laws rather than doctrine. And, the federal courts led by the U.S. Supreme Court, became the architects of secular norms

[8] U.S. CONST. art. VI.

and the arbiters of citizenship standards. These legally defined values held together the diverse collection of American states and peoples.

Constitutionally protected, minority religions have remained key challengers of the civic status quo. Each U.S. Supreme Court case examined in this dissertation represents a fulcrum which helps to leverage a significant minority religious community into the American mainstream. Within the time and context of a particular case, the nation's highest court has examined specific challenges to a religion's chosen means of American accommodation in light of the broader ideals and general needs of U.S. society. The history of exclusion preceding each case and the subsequent growing inclusion shows these Supreme Court decisions to be central to the adaptation process. More than providing a vehicle of inclusion, each case involves legal contestation over one of four key citizenship elements: rights, duties, membership, and participation.[9]

Through decisions concerning particular citizenship elements, the U.S. Supreme Court has guided the country toward either integration or assimilation of the minority religious community in question. In so doing, the justices set the stage for either the expansion or constriction of citizenship norms affecting all minority religious communities within U.S. borders.

Yet, the justices have not had the last word. In the end, it has been the U.S. public majority which has either accepted or rejected the justices' lead. Many times, the American citizenry has chosen to broaden citizenship norms even when the U.S. Supreme Court appeared to rule for conformity.

[9] These four citizenship elements are established and defined in the Chapter 2 – Methodology for Citizenship, beginning on p. 45 below.

This dissertation has two distinct dimensions. First, it constitutes a descriptive account of events surrounding U.S. Supreme Court decisions significant to minority religious adaptations to the United States and their reception by the American society. Second, consideration is given to the normative implications of these events and the interplay of values (both civic and religious) upon the dialectical development of American citizenship norms and minority religious adjustments to the U.S. environment.

As a descriptive account, the dissertation constitutes a creative examination of the interactions among the cultural negotiations, legal decisions, and communal interpretations which have allowed the diverse Abrahamic religions[10] access to U.S. citizenship. As such, it is neither intended as a simple historic account of the political treatment of religious minorities nor as a strict analysis of legal precedent. Rather, it is a multifaceted, interdisciplinary exploration of key moments in the Supreme Court's consideration of the religious liberty for sizeable minority faith communities. It is also an examination of several key legal decisions affecting the equal treatment of American citizens generally.

The normative methodology correlates political and legal ideals of American citizenship with historic and sociological adaptations of minority religious norms to U.S. society. Consideration is first given to the distinct religious lenses and normative adaptations that the different religious communities have applied in their attempt to acculturate within American society. Next, we examine the reaction of American society

[10] The Abrahamic faiths are Judaism, Christianity, and Islam. All three religions claim descent from the Jewish patriarch Abraham and espouse monotheism. Note that the Christian doctrine of the Trinity causes Jews and Muslims to question Christian monotheism, but Christians insists that they worship One God in Three Persons. *See* Huston Smith, *The World's Religions* (New York: HarperSanFrancisco 1958), pp. 321, 344-345.

sparked by these religious adaptations. Then, the legal disputes and judicial rulings are sifted to determine which citizenship elements were in tension and how those tensions were resolved by the federal courts. Last, we contemplate the impact of these case decisions on the ongoing interactions between minority religions and American society, as well as the normative implications for U.S. citizenship ideals.

Through this correlative methodology, recognition is given to the fertile link between politics and religion. Governments and political elites possess the outward authority to control the political context in which faith groups exist and operate. The implementation and enforcement of laws are the assertions of this political authority and worldly power. At the same time, religious communities have the spiritual influence and often the institutional leverage to provide, withhold or contest the legitimacy underlying governmental control and political power. This provides an authority to religious leadership that may directly affect the temporal power of government leaders.

I. Interdisciplinary Underpinnings

This dissertation constitutes a creative examination of the interactions between cultural negotiations, legal decisions, and communal interpretations which have allowed the diverse Abrahamic faiths access to U.S. citizenship.[11] As such, it is neither intended as a simple historic account of the political treatment of religious minorities nor as a strict analysis of legal precedent. Rather, it is a multifaceted, interdisciplinary exploration of key moments in the Supreme Court's consideration of the religious liberty for sizeable

[11] The three Abrahamic faiths are Judaism, Christianity, and Islam, which all identify Abraham as their founder. This dissertation focuses on these faiths because their communities constitute the most influential minority religious communities in the United States in terms of both influence and numbers. *See* Patrick Allitt, *Religion in America Since 1945: A History* (New York: Columbia University Press 2003), pp. 259-261; Yvonne Yazbeck Haddad, *Not Quite American?* (Waco, TX: Baylor University 2004), pp. 2,

minority faith communities and the common good of American citizens generally. The methodology correlates political and legal ideals of American citizenship with historic and sociological adaptations of minority religious norms to U.S. society.

For these reasons, this dissertation owes much to the academic disciplines of history, political science, law, and sociology. The theory and research of these fields inform the critical lenses applied and conclusions reached throughout this study. From the convergence of these distinctive disciplinary perspectives, a richly complex understanding of the normative interaction between minority religious adaptations, majority reaction, responsive legislation, federal court decisions, and the public rejoinder emerges. All intersect to reveal the central elements and normative aims that contribute to the unfolding of American citizenship ideals. As a result, a new citizenship model is developed which necessarily builds upon several crucial interactions between these named disciplines.

A. Interaction between Religious Ethics & Political Norms

In *Plurality & Christian Ethics,* Ian S. Markham argues that America offers the world a significant normative discovery in its religious affirmation of plurality.[12] He offers the United States as a model for pluralistic accommodation of diverse immigrants and appreciative embrace of the resources offered by their distinctiveness. Markham commends America as a religiously informed society that affirms all faiths rather than enforcing secularism.[13]

Joined by Rogers Smith and David Hollenbach, Markham asserts that U.S. civic ideals of religious non-establishment and free exercise open the space for public involvement of

[12] Ian S. Markham, *Plurality & Christian Ethics* (Cambridge: Cambridge University Press 1996), pp. 129, 194-195.
[13] Markham, *Plurality & Christian Ethics* , pp. 107, 192-194.

faith groups unassociated with governmental power and free from coerced religious privatization.[14] Faith communities possess resources including motivation, skills training, and associational networks. These religious assets can contribute or undermine the good of all citizens within free democratic societies.[15] Yet, all acknowledge that application of these American ideals necessarily remains as imperfect in real-world endeavors as they are instructive to legal conceptions.[16]

Historian Rogers Smith, in particular, warns against the failure to inspire public faith in America's civic ideals which has previously resulted in the cyclical rise of ascriptive identities and reactive legislation. According to Smith, U.S. citizenship norms are the unifying force that conveys America's common civic identity, wins voluntary allegiance, and inspires shared public purpose. Absent these values, the nations' diverse citizenry fractures into a myriad of separate groups with conflicting interests.[17] Religious liberty and church-state separation are considered two of these unifying American ideals.

While church-state separation is an assumed hallmark of U.S. polity, the challenge is to understand the often complex and subtle ways in which such separation has actually operated. David Hollenbach provides a particularly useful Roman Catholic mediating model that allows for church-state separation while explaining religious-political interaction. His interactive method will be adapted to the theological realities of our study which include Judaism, Christianity, and Islam. Framing political freedom of religion as a companion to interactive social solidarity, Hollenbach insists that separation of church

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[14] Ian S. Markham, *Plurality & Christian Ethics* (Cambridge: Cambridge University Press 1996), pp. 25, 129, 194-195; ; Rogers Smith, *Civic Ideals* (New Haven, CT: Yale University Press 1997), pp. 496-498, 488; David Hollenbach, *The Common Good & Christian Ethics* (Cambridge, UK: Cambridge University Press 2003), pp. 118-119.
[15] Hollenbach, *The Common Good & Christian Ethics*, p. 104.
[16] Smith, *Civic Ideals*, pp. 496-498, 488; Hollenbach, *The Common Good & Christian*, pp. 118-119; Markham, *Plurality & Christian Ethics*, pp. 25, 129, 194-195.
[17] Smith, pp. 487-488, 496-498

and state does not preclude a public role for religion. Rather, nonestablishment may be interpreted as permissive of public religious activity and complementary to social expression of religious freedom.[18]

Through two steps, Hollenbach demonstrates that strong religious convictions can fully support the civic common good with all its religious diversity. While Hollenbach cites Christian values, his analysis will be considered in light of two additional traditions, Judaism and Islam. In addition, the steps will be adapted to provide the structure for our exploration of the normative interactions between American religions and politics.

First, Hollenbach shows that the Christian tradition values the good of all persons.[19] In fact, a theology of membership and universal hospitality may be found in all three traditions of Judaism, Christianity, and Islam.[20] Second, Hollenbach insists that differentiation of church and state does not prevent religious insights from impacting secular life in a free democratic society.[21] Hollenbach demonstrates the strong Christian tradition of applying spiritual truth to challenge and transform temporal power.[22] As in Christianity, Jewish and Islamic faiths have refused to relegate religion to the private sphere separated from public life. Rather, all three theologies support differentiated, but interactive realms for sacred values and secular norms.[23]

Nonestablishment does reject state enforcement of any particular religious belief, but it does not prevent the public expression or free exercise of any religious community.

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[18] Hollenbach, pp. 119-120.
[19] Hollenbach, p. 114, 134-136. Yet as Marc Gopin and David Hollenbach remind us, all religious traditions contain messages of exclusion and intolerance as well as membership and hospitality. Hollenbach, *The Common Good & Christian Ethics* (Cambridge, UK: Cambridge University Press 2003) pp. 113-114; Marc Gopin, *Between Eden and Armageddon* (Oxford: Oxford University Press 2000), pp, 199-206.
[20] *See* Appendix I: Supporting Theologies.
[21] Hollenbach, p. 118-120.
[22] Hollenbach, pp. 128, 134-135.
[23] *See* Appendix I: Supporting Theologies.

According to Hollenbach, what is required of religions in a plural secular setting remains the affirmation of freedom of conscience. He cites the Vatican II *Declaration of Religious Freedom* as the Catholic concession of the universal right to religious liberty.[24] Recognizing such freedom as inherent respect for human dignity, the Catholic Church formally rejected religious coercion and accepted non-establishment as the governmental consequence. Still the Vatican affirmed the public engagement of religious communities as yet another aspect of religious freedom.[25] Once again, Judaism and Islam possess theologies that recognize that genuine religious faith must be freely adopted and can not be coerced.[26]

Adaptation of David Hollenbach's analysis of religion and politics provides the basis for both religious support of the civic common good and the expression of diverse moral reflections within the public square of a free democratic society. The dialectical tensions between persons of conscience and their state will illuminate the issues and the potential advantages that constitutional freedoms coupled with open democratic relationships offer to both. Extension of the model from Christianity to Judaism and Islam provides widespread theological promise of increased spiritual support for diversity of citizenship and constitutionally guaranteed freedom of belief. It also underscores the civic potential for a more unified society and a more stable democracy.

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[24] Hollenbach, pp. 116-117.
[25] Hollenbach, p. 119 referencing Vatican Council II, "Dignitatis Humanae," *Declaration on Religious Freedom*, no, 2 which can be found in Austin Flannery, ed., The Basic Sixteen Documents of Vatican Council II: Constitutions, Decrees and Declarations (Northport, NY: Costello Publishing Co. 1996), pp. 551-568, at pp. 559-560.
[26] *See* Appendix I: Supporting Theologies.

B. Interaction between American Law, Citizenship, and Liberty of Conscience

In the United States, religious faith and state governance intersect on a number of political levels to form citizenship norms. The federal governmental structure of the country provides legitimacy to parallel national and state authorities. However, the First Amendment of the U.S. Constitution guarantees both religious freedom from official religious establishment and liberty from governmental interference with the exercise of one's faith.

While the U.S. Constitution establishes three branches of federal government, the framers recognized the legitimacy of state and local authorities' authority over their citizens' health, safety, and welfare. The Constitution conferred limited powers on the Congressional representatives to pass laws, the Executive to implement these laws, and for the Courts to interpret them.[27] Under the Tenth Amendment, any powers not specifically granted to the national government were reserved to the States.[28] The First Amendment of that same Bill of Rights specifically denied political establishment of any religious authority.[29]

Among the branches of government, none has proven more powerful or influential than the U.S. Supreme Court. Under the early nineteenth century tenure of Chief Justice Marshall, the U.S. Supreme Court declared itself to be the primary interpreter of the American Constitution and construed the Constitutional powers granted the federal government to be impervious to state interference.[30] During the twentieth century, the

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[27] U.S. CONST. arts. I, §; II, §1; and III, §1-§2.
[28] U.S. CONST. amend. X,.
[29] U.S. CONST. amend. I.
[30] In *Marbury v. Madison*, the U.S. Supreme Court established the "doctrine of judicial review" *Marbury v. Madison*, 5 U.S. 137 (1 Cranch 137); 2 L. Ed. 60 (1803); *Cooper v. Aaron*, 358 U.S. 1, at 4-20; 78 S. Ct. 1401; 3 L. Ed. 2d 5 (1958). *See* Sandra Day O'Connor, *The Majesty of the Law* (New York: Random House 2003), pp. 242-244; Robert G. McCloskey, *The American Supreme Court* (Chicago: University of

high court gradually developed the "incorporation doctrine" by applying the Bill of Rights against state governments through the Fourteenth Amendment.[31] Before the advent of the incorporation doctrine, the U.S. Supreme Court rarely considered the First Amendment religious guarantees.

One result of religious liberty was that U.S. Supreme Court's decisions not only determined our nation's law but came to define its civic norms.[32] First Amendment guarantees against religious establishment coupled with the separation of church and state assured that no one religious voice could define American social standards. Because no litigant is entitled to more than a single trial and one review, the Justices decide only

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Chicago, 4th ed. 2005), p. 257. Note that Thomas Jefferson himself protested: "Nothing in the Constitution has given [the Court] a right to decide for the Executive" whether the law is unconstitutional. Thomas Jefferson, Letter to Abigail Adams (Sept. 11, 1804), in 8 The Writings of Thomas Jefferson 311 (Paul Leicester Ford ed., 1897).

Later, in M'Culloch v. Maryland 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), the Court established that the states can not impede the Federal government's exercise of valid constitutional powers. Thereafter untill 1937, the Supreme Court frequently invoked the Tenth Amendment "to curtail powers expressly granted to Congress, notably the powers to regulate commerce, to enforce the Fourteenth Amendment, and to lay and collect taxes." U.S. Constitution: Tenth Amendment – Reserved Powers," accessed at http://caselaw.lp.findlaw.com/data/constitution/amendment10/01.html on 7/17/08.

[31] The "incorporation doctrine" refers to the United States Supreme Court engagement from 1925 to through the 1980's in a gradual, case-by-case process of extending specific Bill of Rights protections against the states under the due process clause of the Fourteenth Amendment. The U.S. Supreme Court explained its incorporation doctrine in *Gideon v. Winwright*, 372 U.S. 334, at 340; 83 S. Ct. 792; 9 L. Ed. 2d 799 (1963), where it described the Fourteenth Amendment as enveloping "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." In *Pointer v. Texas*, 380 U.S. 400, at 409, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), Justice Harlan's concurring opinion offered further explication:

> "The philosophy of 'incorporation' … subordinates all such state differences to the paticular requirements of the Federal Bill of Rights … and increasingly subjects state legal processes to enveloping federal judicial autority. 'Selective incorporation or 'absorption' amounts to little more than a diluted form of the full incorporation theory. Whereas it rejects full incorporation because of the recognition that not all of the guarantees of the Bill of Rights should be deemed 'fundamental,' it at the same time ignores the possiblity that not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental."

See James Hitchcock, *The Supreme Court and Religion in American Public Life*, Vol. 1 (Princeton, NJ: Princeton University Press 2004), p. 159.

[32] *See* Robert Bellah and Phillip E. Hammond, *Varieties of Civil Religion* (San Francisco: Harper San Francisco 1982), Chapter 6 *accessed on web at* http://www.religion-online.org/showchapter.asp?title=3041&C=2606 on 12/20/2007.

controversial matters of great public importance.[33] As a common law court functioning in a democracy, the Court finds and gives reasons for its decisions which both establish and legitimate the law through appeal to both established legal precedent and common moral values. Thus, the U.S. Supreme Court's decisions not only determine our nation's law but define its civic norms.[34]

The First Amendment of the U.S. Constitution guaranteed religious freedom from official church establishment and from governmental interference with the exercise of one's faith. As chief architects of the U.S. Constitution and Bill of Rights, Thomas Jefferson and James Madison severed citizenship from an established religious faith. Their purpose was to create a secular nation whose government did not interfere with matters of individual conscience.[35] Under the American Constitution, governmental legitimacy was based upon the social contract, rather than the divine right of kings. Consent of the governed replaced the social order imposed by monarchs as the basis for government. The rule of law, not the will of kings or the whim of deities, would govern

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[33] *See* William Howard Taft, testimony, in Hearings before the Committee on the Judiciary: House of Representatives, on H.R. 10479, "Jurisdiction of Circuit Courts of Appeals and United States Supreme Court," 67thCongress, 2nd session, March 30, 1922, 2 *cited by* Ronald B. Flowers, *That Godless Court?* (Louisville, KY: Westminster John Knox Press 2005), p. 3.

[34] *See* Robert Bellah and Phillip E. Hammond, *Varieties of Civil Religion* (San Francisco: Harper San Francisco 1982), Chapter 6 *accessed on web at* http://www.religion-online.org/showchapter.asp?title=3041&C=2606 on 12/20/2007.

[35] Only **three religious references exist in the U.S. Constitution,** underscoring the Founders' commitment to framing a secular government: the Art. VI allowance of the use of affirmations as well as oaths of public office, the Art. VI ban on the use of religious tests for federal office holders, and an innocuous reference in the signatory clause to the date in "the Year of our Lord"). The secular language of the constitution caused rancor in the debates held in the state ratification conventions and caused some Christians to openly express concern, "fearing that a secular constitution marginalized God and religion." Mark Douglas McGarvie, *One Nation Under God* (Dekalb, IL: Northern Illinois University Press 2004), p. 58, see also, pp. 50-59. "Treaty of Peace and Friendship with Tripoli," Art. 2 (1802) explicitly states that religious differences cannot create conflict between the U.S. and Muslim Tripoli because "the government of the United States is not, in any sense, founded on the Christian religion." U.S. Congress, *American State Papers: Documents, Legislative and Executive of Congress of the United States* (Washington, D.C.: Gales and Seaton, 1832-1862), 2:18; see also *U.S. Statutes at Large*, 8:155. Note: Morton Borden has questioned the authenticity of this language in his work *Jews, Turk, and Infidels* (Chapel Hill: University of North Carolina Press, 1984), pp. 534-568.

human behavior. The people were no longer submissive subjects of the British monarch, but equal individual citizens endowed with inalienable rights and human agency. Their God-given autonomy empowered them to create a nation and to change their own history.

In this new republic, citizenship encompassed certain inalienable natural rights. Matters of conscience continued to be honored as an instrument for instilling moral behavior. The challenge was to provide moral guidelines for citizenship while honoring freedom of conscience. The American founders, depending upon whether they were Jeffersonian Republicans or Federalists, had distinctly different ways of approaching this dilemma. Their views would directly impact American ideals concerning citizenship, religious liberty, minority religions, and democratic governance.

After introducing a new model of citizenship, the dissertation will explore the liberal views of the leading Republicans responsible for the framing the Constitution and for early governance, namely Thomas Jefferson and James Madison. Then, we will turn to the more conservative perspectives utilized by judicial interpreters of the Constitution and official creators of American legal principles, including Supreme Court Justices John Jay and John Marshall. Our review will reveal how liberal republicans and moderate federalists both played a part in forming the United States as a secular republic. In so doing, they concurrently provided citizenship and unprecedented liberty to religious minorities while imposing upon them a certain kind of Protestant Christian ethic. Second, it will describe how the U.S. Supreme Court avoided becoming embroiled in the interpretation of religious doctrinal disputes by utilizing contract law to resolve religious disputes. Through the law of charitable incorporation, the nation's high court forged a

path toward assurance of church independence from state interference as well as government separation from religious authorities.

Later chapters will explore the views of succeeding political leaders and jurists on inclusive citizenship and liberty of conscience will be explored in order to determine how the norms of citizenship and matters of religion have continued to interact and impact the rights of individuals faithful to minority religious views. Subsequent chapters will utilize the theoretical work of this chapter to provide a basis to explore how the tensions between patriotism and faith, orthodoxy and assimilation, as well as political action and religious belief have been historically addressed by succeeding groups of religious minorities.

C. Sociology of Minority Religious Adaptations & American Reception

Over time, religion has proven to be an important factor in the interactive adaptations of minorities to U.S. society and American majority perceptions of them. U.S. history demonstrates that faith communities have played key roles in the success or failure of minority integration into the American mainstream.[36] Distinct minority religious accommodations to America have sometimes sparked public fear. Federal courts often have mediated the resulting cycle of reactive state legislation and religious legal challenges. This study will reveal the sociological roles that religion, public, and the U.S. Supreme Court play in the normative conflicts and legal struggles surrounding minority adaptations and their reception by the American mainstream.

In the U.S., religion has long provided minorities with social support and integrative resources allowing them to function in a hostile local environment. Places of worship

[36] Alejandro Portes and Ruben G. Rumbaut, *Immigrant America* (Berkeley, CA: University of California Press, 3d ed. 2006), pp. 302-306.

offer their membership familiar rituals and religious traditions that bolster ethnic pride and foster self-confidence. Reference to universal meanings and common normative systems assist adjustment of believers to adverse social realities. Faith communities provide channels of communication and networks for welfare assistance that support minority survival and social acculturation. Further, religious groups often serve as incubators for unique adaptations that facilitate successful interaction with mainstream society. Such minority religious adaptations may take many forms including parochial schools, enclave businesses, or collective action.

American majority perceptions of these minority adaptations likewise have been influenced by religion. Often, theological support underlies theories of minority acculturation and their popular reception. Since the nation's founding, competing positions on minority assimilation have existed. Americanization has been expressed as putative Anglo-Conformity by founding Supreme Court Justice John Jay, nineteenth century Nativists, and today's advocates of heightened border security.[37] Concurrently, voluntary assimilation or the "melting pot" has been advocated by Hector St. John Crevecoeur, Israel Zangwill, and current core culturalists.[38] Neither group fully appreciated that assimilation was a two-way process nor fully recognized the positive

[37] Anglo-Conformity is defined as requiring acculturation in the dominant mode of white, middle-class U.S. Protestants hailing from British ancestry. Alba and Nee, *Remaking the American Mainstream,* pp. 4, 17, 26, and 61. *See* Stewart G. Cole and Mildred Wiese Cole, *Minorities and the American Promise* (New York: Harper and Brothers 1954), Chapter 6; cited in Milton M. Gordon, Assimilation in American Life: *The Role of Race, Religion, and National Origins* (Oxford: Oxford University Press 1964), p. 85, ftn. 1. *See also* Joe R. Feagin, "Old Poison in New Bottles: The Deep Roots of Modern Nativism," *Immigrants out!: The New Nativism and the Anti-Immigrant Impulse in the United States*, J. F. Perea, R. Delgado, J. Stefancic, eds. (NewYork: New York University Press 1996), pp. 13-43, at pp. 34-30.

[38] Alba & Nee, pp. 17-18, 22-23, 289; William R. Hutchison, *Religious Pluralism in America* (New Haven, CN: Yale University Press 2003), pp. 189-191; Feagin, "Old Poison in New Bottles," ,pp. 34-39. *See also* Richard Fox and James T. Kloppenberg, eds., "Assimilation," *A Companion to American Thought* (London: Blackwell Publishers, Ltd. 1998), pp. 44-48.

social contributions of minority groups.[39] Until the 1960's, locally dominant Protestant churches largely have supported minority conformity while minority religious groups have defended the right to freedom of conscience.[40] Both government institutional structures and informal social rules supported maintenance of the WASP model of acculturation and assimilative models of citizenship, assuring continued elite Protestant control of the social mainstream.[41]

Over time, also, alternative models of assimilation began to take shape, as new knowledge of demographics allowed a better understanding of just who were American citizens. Based upon empirical research, sociologists at the University of Chicago during the 1920's and 1930's provided secular models which increasingly recognized that the American acculturation of minorities was an interactive process in which minorities affected the dominant culture as well as adapted to it.[42] While post-W.W. II institutional changes provided minority citizens predictable modes of social mobility, the social movements of the 1960's sparked the transformation of citizenship formation theory.[43] A particularly notable development was the growing effort by the U.S. Supreme Court to extend the protections of the religious clauses to minority faith communities whose rights were violated by state and local governments.[44]

As ethnic minorities began to assert their group identities in the 1950's and 1960's, they were supported by their distinct religious communities. African-American Protestants, Jewish Activists, Black Muslims, Hispanic Catholics helped sustain and

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[39] Alba & Nee, pp. 1-2, 4-5.
[40] Hutchinson, 209, 213-214, 218. Note that there have been exceptions to such as mainline Protestant support for Walter Rauschenbusch's Social Gospel Movement and Jane Adam's Settlement House Movement.
[41] Alba & Nee, pp. 12, 26, 53, 57, 65. Hutchinson, 209.
[42] Alba & Nee, pp. 18-35, 63-66.
[43] Alba & Nee, pp. 57-59, 65.
[44] *See* page 16, ftn.31 above discussing the Supreme Court's development of the "incorporation doctrine."

provide theological justification for the efforts of Martin Luther King, Jr., Rabbi Abraham Joshua Herschel, Malcolm X, and Caesar Chevez. Through minority confrontation of majority norms and advocacy for civil rights, the 1960's became the watershed of *de jure* transformation of American citizenship and theoretical extension of acculturation concepts.[45] The 1965 Civil Rights Act and Immigration Reform Act provided laws combating discrimination against religious, ethnic, and racial minorities in public life and immigration quotas. Secular theorists began to provide additional models of minority integration including pluralism, multiculturalism, and segmented assimilation.[46] These new theories of acculturation coincide with similar developments in citizenship concepts, set forth above. The stage was set for popular acknowledgment of deep diversity and recognition of multiple converging mainstreams.[47]

Although these public developments made discrimination increasingly illicit and therefore covert, new social interactions created by official reforms are designed to change social attitudes about diversity and to alter informal behaviors toward minorities.[48] As institutional changes have softened boundary perceptions, the deficiencies in older assimilation theories have become apparent. Explicit and implicit presumptions of ethnocentrism, one-directional minority adoption of majority ways, and the inevitability of irreversible American acculturation over generations are now questioned.[49]

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[45] Alba & Nee, pp. 14, 36-38, 58, 279-280..
[46] Alba & Nee, pp. 6-8, 14, and 289, 163-166 (pluralism), 141-145 (multiculturalism), 161-163 (segmented assimilation), 276 -277.
[47] Alba & Nee, pp. 58, 279-280, 287-289.
[48] Alba & Nee, pp. 6-8, 57, 279-280, 287.
[49] Alba & Nee, pp. 64-65, 275.

Today, many recognize that minorities experience a full repertoire of causal motivations and adaptive responses, multiple individualist and collective patterns, as well as a host of formal and informal rules. It is now understood that racial, religious, and ethnic boundaries not only may be crossed, but stretched, blurred, and redefined. Integration of multiple streams is no longer as threatening to most citizens as the old Americanization notions that coerce assimilation into one homogenous whole.[50] This dissertation will help reveal why secular institutions and religious traditions, including courts and faith communities, will continue to play a role in forming civic norms that define U.S. citizenship and shape distinctively American religious communities.

II. Selection of Subject Material

In preparation for this dissertation, great care has been taken to select the legal cases and political theorists which will shed light on the uniquely American citizenship norms that have emerged from religious minority challenges. The subsections below recount the reasons for these choices. Most importantly, the author believes that the case contexts are historically representative of the unique challenges facing the American minority religious communities named in this dissertation. Further, the identified philosophers are representative of distinct U.S. citizenship traditions. At the same time, these thinkers offer further explication and critique regarding the formative elements of American citizenship.

[50] Alba & Nee, pp. 60-63, 66, 162 286-288.

A. Choice of Minority Religious Cases

Three U.S. Supreme Court cases and one Second Circuit decision have been chosen for study. Their selection is based upon the significant affect of each ruling upon the American assimilation or integration of a key minority religious community. The cases reveal the context, bases, and resolution of judicial decisions upon disputes involving the crucial accommodations to the American context made by Protestant, Catholic, Jewish, and Muslim minorities. Examined in chronological order, the first two cases span the historic watershed of the incorporation doctrine, with the remaining cases spaced approximately forty years apart.[51]

These selected cases follow both the historical unfolding of American cultural focus on minority faiths as well as the political and sociological contours of Constitutional jurisprudence concerning religious liberty. The first two involve the Court overruling

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[51] The "incorporation doctrine" refers to the United States Supreme Court engagement from 1925 to through the 1980's in a gradual, case-by-case process of extending specific Bill of Rights protections against the states under the due process clause of the Fourteenth Amendment. With regard to the First Amendment religious guarantees, this process began in 1940 resulting in the high court's consideration of an increasing number of religion cases. Initially, the Court applied the First Amendment protection of Free Exercise to the individual States in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). Seven yearts later, the Court employed Establishment Clause protections against the States in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 2d 711 (1947). Note that one hundred years previously**,** in 1833, the Supreme Court had specifically limited the application of the Bill of Rights to the federal government See: *Barron ex rel. Tiernon v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833). The U.S. Supreme Court explained its incorporation doctrine in *Gideon v. Wainwright*, 372 U.S. 335, at 340; 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), where it described the Fourteenth Amendment as enveloping "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." In *Pointer v. Texas*, 380 U.S. 400, at 409, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), Justice Harlan's concurring opinion offered further explication:

> "The philosophy of 'incorporation' … subordinates all such state differences to the particular requirements of the Federal Bill of Rights … and increasingly subjects state legal processes to enveloping federal judicial autority. 'Selective incorporation or 'absorption' amounts to little more than a diluted form of the full incorporation theory. Whereas it rejects full incorporation because of the recognition that not all of the guarantees of the Bill of Rights should be deemed 'fundamental,' it at the same time ignores the possiblity that not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental."

See James Hitchcock, *The Supreme Court and Religion in American Public Life*, Vol. 1 (Princeton, NJ: Princeton University Press 2004), p. 159.

state legislation jeopardizing a minority Protestant faction's existing college charter and Catholic parents' right to choose parochial schools. Both the *Dartmouth College*[52] and *Pierce*[53] cases concern the right of private, religious academies to exist as an alternative to secular, state-established schools. During the 19th and early 20th centuries, education was the select means by which minority Christian religious groups attempted to perpetuate their distinct existence in America, hoping to instill religious beliefs, traditions, practices, and values in the next generation. The U.S. Supreme Court's decisions in both cases not only resolved the disputes at hand in favor of minority religious liberty, but legitimated parochial education and shaped the future assimilation of American citizens sharing these faith traditions.

The third case involves U.S. Supreme Court consideration of Orthodox Jewish businessman's challenge to Sunday closing laws. In the *Braunfeld Case*,[54] an observant Jew defended his conduct of Sunday commerce in violation of civic Blue Laws so that he could economically afford to observe the *halakhahic* Saturday Sabbath. His lawsuit highlighted the success of Jewish merchants in establishing an enclave economic niche for Sunday shopping and the hostile regulatory response it elicited from their mainstream competitors. We will explore the high court's decision to uphold Sunday closing statutes as supporting a communal day of rest, over a strongly worded dissent that Blue Laws forced Jews to choose between their religious faith and economic survival. Then we will see that the American mainstream ultimately disregarded this ruling, concerned more with commercial convenience rather than civic principle.

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[52] *Trustees of Dartmouth College vs. Woodward,* 17 U.S. (4 Wheat) 518, 4 L. Ed. 629 (1819).
[53] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510; 45 S. Ct. 571; 69 L. Ed. 1070; 1925 U.S. LEXIS 589; 39 A.L.R. 468 (1925).
[54] *Braunfeld v. Brown,* 366 U.S. 599, at 607-609, 81 S. Ct. 1144, at 1148-1149, 6 L. Ed. 2d 563 (1961).

Because these three U.S. Supreme Court opinions determined the constitutionality of distinct Protestant, Catholic, and Jewish modes of accommodation to American society, they constitute the legal precedents under which current Muslim American adaptations will be evaluated. For this reason, the historical, political, legal, and sociological insights gained from these three Supreme Court Cases will be applied to a recent homeland security case brought by American Muslims. Decided by the U.S. Second Circuit Court in 2007, the *Tabbaa* Case[55] involved federal court attempts to resolve the tensions arising between public demand for secure national borders and Muslim American assertion of their religious liberties.

As the circumstances surrounding the *Tabbaa Decision* demonstrates, anxiety over religious fanaticism, fears about national security, and discomfort related to cultural difference continue to interact with concerns about First Amendment liberties, religious tolerance, and freedom of conscience. All of these apprehensions affect American's treatment of their fellow citizens. Once again it falls upon the federal courts to arbitrate the clash between the undeniable liberal guarantees of the U.S. Constitution and the recurrent illiberal fears of the American people. Through their decisions, the nation's courts either invite minority religious community integration or requiring their assimilative conformity.

This interdisciplinary study of these historic decisions is intended to expose the factors which both assist and inhibit the integration of religious minorities into full American citizenship. Key to this aim, the development of a citizenship model will allow focused examination of the elemental tensions and civic resolutions which represent each court decision's contribution to the development of American citizenship norms.

[55] *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007).

B. Selection of Political Philosophers

While Jefferson, Madison, DuBois, Paine, and other classic theorists have had significant impact on U.S. citizenship norms, this study will explore contemporary theorists whose writings illumine the strengths and weaknesses of current developing ideals. John Rawls's thoughts on rights embody the critical American emphasis upon individual freedom of choice as well as help illustrate its problematic lack of attention to communal needs. Regarding duty, Walzer underscores respect for local definitions of public good even as he fights charges of relativism. McIntyre emphasizes the development of democratic virtues through public practices even as his critics warn that he risks reinforcing the tyranny of tradition and institutions. Iris Marion Young and William Kymlicka provide new insights for restructuring national membership to provide greater voice and openness to marginalized groups. Yet, their suggestions do limit the integrative functions of national citizenship. Finally, Seyla Benhabib presents fuller concepts of democratic participation through norms of inclusive discourse and active engagement. While her visions may be interpreted as rejecting a more integrationist citizenship, Benhabib paves the way toward a broader democratic base with greater comprehensive participation.

Later, these theoretical contributions and limitations will provide insights into the historic American events surrounding the critical legal challenges to citizenship norms raised by minority religious communities. Through these lenses, the important balance of all four of these elements becomes apparent. At the same time, the critical role of religious communities in the formation of American citizenship ideals is revealed in the historic record as these groups continually challenge secular understandings toward

negative/positive rights, duties as obligation/privilege, inclusive/exclusive membership, or active/passive participation.

C. Working Definitions & Understandings

Instrumental to this study will be the civic norms of *citizenship* and faith-filled virtues of *religious community membership*, religious adaptation to U.S. society through *assimilation* and/or *integration*, and the norms (civic and religious) that foster attitudes of *toleration* and/or *welcoming.* Therefore, for the purpose of this study, the following key terms are specifically defined below: *citizenship, nation, state, religion, church, religious community membership, isolation, assimilation, integration, tolerance, acceptance,* and *welcoming.*

Citizenship: Full membership in a territorial nation-state accompanied by allegiance to it by virtue of birth or naturalization and entitlement to full legal, civil, and social rights. Citizenship in a post-colonial nation both bestows rights of complete membership and requires obligations of loyalty.

Nation: A community of people sharing a common descent, history, culture, and language that binds them to one another and often to a particular geographic territory.[56]

[56] ***Nation-state*** is a concept which arose with the modern creation of an international legal system of states created by the Treaty of Westphalia (1648) that ended the Thirty Years War between Protestants and Catholics in Europe. The Treaty did this through the Holy Sea's recognition of the break-up of the Holy Roman Empire, the existence of the Lutheran Church, and the legitimate political authority of secular rulers over the denizens of their territory. And, this event was the founding basis for the modern concepts of nationalism and citizenship. Throughout the modern era, the nation-state was the common, implicit frame for citizenship. However, with the advent of globalization and the post-modern era, there is a movement to define citizenship in a broader, cosmopolitan manner or to deconstruct the term altogether. See Engine F.

State: The political entity that is accepted internally and internationally as the legitimate governing authority over the denizens of a particular geographic territory.

Religion: The term religion denotes the chosen tradition shared by an individual with their community of faith-inspired practices. That faith tradition may encompass ritual, practice, belief, morality, rules, and/or personal experience which are accepted and sanctioned by the religious community as valid expressions of their faith.[57]

Church: The Christian name for the official, sacred house set apart for public worship by the authorities of a particular faith tradition which is both accepted and utilized by its membership for religious services. Often, the term is used as shorthand for a single religious body, denomination, or faction as well as to signify the ecclesiastical government of a particular religious group.

Religious Community Membership: Membership in a religious community denotes the

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Iain and Bryan S. Turner, eds. *Handbook of Citizenship Studies* (Thousand Oaks, CA: SAGE Publications 2002), pp. 3, 6, 280.

[57] It should be noted that eminent Sociologist Emile Durham defined religion as "a unified system of beliefs and practices relative to sacred things" that united persons into a "single moral community," insisting that religion "must be an eminently collective thing." Emile Durham, *The Elementary Forms of Religious Life* (New York: The Free Press 1995), p. 44. While his definition fits the monotheistic "religions of the book," it fails to define many of the Eastern religions. Perhaps, Clifford Geertz offered a more accurate understanding when he indicated that religion, by fusing a particular traditional ethos of faith with members' worldview, supply human members with a set of social values that appear to them to be objective and thereby, satisfy the common human desire for some factual basis for his/her commitments. Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books 1973) , pp. 90, 127-129, 131.

status of being a part of a community with a distinct faith, belief, and practices. Membership can be measured in degrees varying from the bestowal of one's ultimate allegiance to one's religious community and one's faith beliefs to a minimal identification with one's religious community that falls short of complete adherence to its beliefs and practices.

Isolation: The retreat of a religious, ethnic, and/or cultural community into its own private sphere to the exclusion of the rest of American society will be referred to as isolation. This private sphere may be composed of a religious communion, an established compound, an urban ghetto, a separate town, an excusive community, one's home or limitation of one's personal contacts to one's faith fellowship.

Assimilation: Another focus of this study is the extent to which persons with varying degrees of connection to their religious, ethnic, and cultural community adapt to life within American society. Assimilation refers to the abandonment of outwardly visible signs of one's religious, ethnic, and cultural heritage in order to adopt the external characteristics of U.S. societal membership. It is characterized both by differing levels of conformity and agency, as well as precipitated by varying degrees of outside coercion and internal willingness.

Integration: Integration means the process of bringing members of different religious, ethnic, and cultural communities into complete membership within U.S. society in a way that they are able to retain their distinct identities while enjoying a full and

equal relationship to other American citizens. In order for integration to occur, there must be an elimination of legal and cultural barriers so as to permit unfettered association between all members of the society, immigrant or native born, religiously devout or secularly convicted.

Tolerance: One focus of this dissertation is upon the degree of American society's acceptance of persons who have varying degrees of connection to their religious, ethnic, and cultural community. Tolerance denotes the society's minimal degree of acceptance of difference which avoids adverse judgment or bias. Yet, this minimal acceptance merely endures difference and therefore, is to be contrasted with the more robust term *welcoming*.

Acceptance: Acceptance denotes society's open reception of persons differing from themselves. It goes beyond mere *tolerance* and simple endurance of diversity. Rather, it encompasses respect and honor for the dignity of the other. Yet, acceptance does not approach the hospitable inclusiveness or enthusiastic embrace of *welcoming*.

Welcoming: Welcoming refers to the society's boundless admission and enthusiastic embrace of religious, ethnic, and cultural diversity. It goes beyond tolerance to ardent inclusion of persons as full citizens and respectful receipt of their difference as unique contributions that enrich American society.[58]

[58] Welcoming is used as a robust political concept bearing theological support from all three Religions of the Book, namely Judaism, Christianity, and Islam. *See* Appendix I: Supporting Theologies.

III. Dissertation Framework

The interactions of religion, politics, law, and sociology discussed in this dissertation are addressed within the framework of four distinct cases filed in the federal courts by members of specific Abrahamic faith communities which compose religious minorities within the United States. Viewed together in historic order, these legal decisions and the stories surrounding them reveal the importance of religious communities in the ongoing development of American citizenship norms. They represent an expanding conversation not only about U.S. citizenship, but the place of minority religious communities within American civil society.

Our purpose in reviewing these cases is to study the Supreme Court's treatment of minority religions concerns and the result upon the social development of American citizenship norms. It is not to engage in legal analysis of precedent or to apply a specific line of cases. Instead, we will carefully observe the Court's considerations, investigate relevant factors, analyze the bases for their decision, and evaluate the holding's impact upon American citizenship.

A. Descriptive Historic Narrative

The descriptive narrative unfolds on three levels. These include the social context, the actual cases, and the effect of the court's decision upon identification of the minority religious community with American citizenship. Regarding the first level of social context, great care is made to discuss the history and diversity of each religious community before the relevant case. The larger society's reception of each group and the minority's attempts to adjust to the American social context are examined. The cases chosen involve both the religious minority's selected means of adaptation and the public

response which it elicited. Out of these reactions, popular perceptions developed about the minority's readiness for citizenship, or worse, their inability to be citizens. Such stigmas and biases not only tore at their social membership, but undermined the acceptance and treatment of religious minorities as equals entitled to full rights, duties, and participation

As matters of significant federal litigation, the cases constitute a second narrative level. This story involves public contestation of issues so major that a court's decision was required for resolution. In order to reach the U.S. Supreme Court, lower court resolution of the disputes must have proven unsatisfactory to both the bench and the public. Each federal case cited herein represents one key moment in which a minority religion's unique engagement with the dimensions of American citizenship is judged publicly acceptable or unacceptable. And, the judicial ruling impacts the public conversation concerning the expansion or contraction of U.S. citizenship norms to include or exclude the minority religious group in question. For a pluralist secular society like the United States, the nation's courts necessarily have become the arbiters of moral norms and definers of social meaning in the absence of a state church or a commonly recognized religious authority. While their legal determinations are highly significant, the federal courts represent only one of many levels of public conversation regarding citizenship.[59]

The response of the minority religious community and the American public to the Court's decision constitutes our third level of inquiry. While the U.S. Supreme Court

[59] In the United States, public dialogue occurs on many different levels and within many different venues. Official democratic forums include executive agency hearings, legislative forums, legal proceedings, town meetings, and school board sessions. Civic conversations also take place in academic settings, voters' leagues, regional councils, and special interest groups, Voluntary associations such as social clubs and charitable organizations, often sponsor public conversations. Religious communities and ecclesiastical bodies also provide forums for general interchange among citizens.

pronounces legal norms, the American people determine the legitimacy of judicial decisions and through their communal response, establish social values. Ultimately, it is the reaction of the public and the response of the religious community which create normative movement toward forced conformity or acceptable integration, continuing exclusion or greater inclusion. As a result of religious minority contest of U.S. citizenship norms both in court rooms and civic forums, the public conversation about citizenship and the place of religious minorities continues to expand.

All three levels reveal tensions between the public construction of U.S. citizenship values and minority religious community identities. At times, American norms and religious traditions work concurrently to both shape religious community members into U.S. citizens and mold the American people into a more moral society. However, as certain principled understandings come into conflict, specific flashpoints develop which reveal a clash of norms that polarizes community members and leads to social division.

B. Normative Analysis

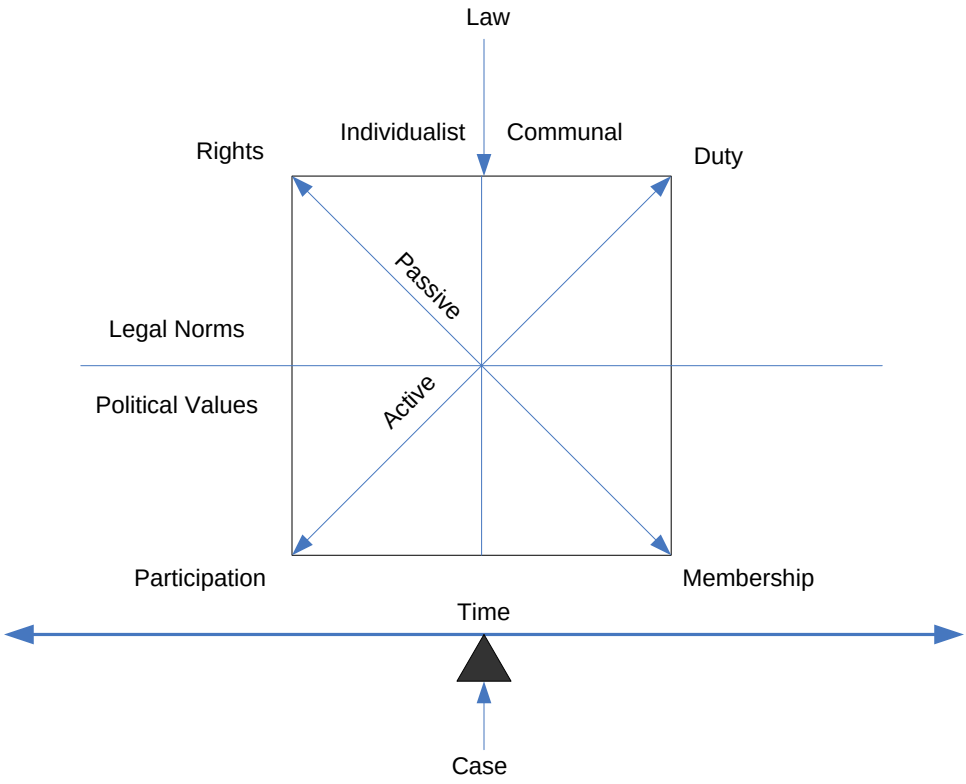
Analyzing our four religious case studies through a moral lens, a distinctive model of American citizenship develops. First, the four crucial citizenship elements of rights, duties, membership, and participation are revealed replete with internal tensions. While a specifically American understanding of every element develops, each case may be understood as an attempt to resolve conflicts over the intersection of two competing elements. Second, the intersections of these four citizenship elements coupled with connecting strands of discrete understanding create an analytical grid which aids visualization and assessment of these inherent tensions.

The particulars of the citizenship grid and the four dimensional citizenship model are further elaborated in the methodology section below, before becoming the subject of Chapter 2 and the basis for the final analysis of Chapter 7. Note that the citizenship models developed in this dissertation are presented as a learning aid. By way of illustration, these tools help make sense of the recurrent cycles of minority religions accommodations to American citizenship standards, popular American reactions to these adaptations, judicial resolutions of the resulting controversies, and the popular responses which continually shape American citizenship norms.

IV. Methodology & Models

Four modes of analysis will be applied to the context of each federal court case in an attempt to understand the specific decision from a historical, legal, political, and sociological perspective. First, historical analysis will be undertaken upon a **chronological, horizontal axis.** Major events preceding, during, and following each case will be examined. Each legal case serves as both a tipping point in the American adaptation of each minority religious tradition as well as a fulcrum for the tradition's theological challenge to existing American citizenship norms. Thus, these Court decisions are analyzed next through a **vertical legal lens** to evaluate the arguments advanced by the various parties, the affect of these arguments upon the Court's decision, the resulting precedents set, and their long-term repercussions upon the dialectical tensions between norms of American citizenship and the social adaptation of the minority religion's membership.

The Citizenship Grid



[See Figure A-1]

Third, the impact of the Court's holdings upon citizenship will be analyzed through a **political philosophical grid** constructed through juxtaposing conceptual approaches. This will be called **The Citizenship Grid**. **[See Figure A-1]** The corner points are composed of the intersection of four formational elements of citizenship: rights, duty, membership, and participation. Specifically, each corner of the analytical grid will be used to represent a distinctly American interpretation of a citizenship element: the Liberal emphasis on **rights**, the Communitarian/Civic Republican focus on **duty**, the Radical Pluralist/Multicultural accent on **membership**, and the Participatory Democracy insistence on **participation**. Interlocutors in this analysis will be John Rawls in *Political*

Liberalism[60] on rights, Michael Walzer in *Spheres of Justice*[61] and Alasdair MacIntyre in *After Virtue*[62] on duties, Iris Marion Young in *Justice & The Politics of Difference*[63] and William Kymlicka in *Multicultural Citizenship*[64] on membership, and finally Seyla Benhabib in *Democracy and Difference*[65] on participation. While contemporary philosophers provide the framework for analysis of the four elements, acknowledgment will be given to the historic American thinkers who helped define the American citizenship debate.

Thus, this philosophical grid provides four diverse political understandings of U.S. citizenship based upon distinct foci. The top left corner consists of the **Liberal** emphasis upon **rights** understood in a negative, passive manner, as the individual's freedom to be left alone. These rights are civil in nature and legal in emphasis. It is this interpretation of rights that was advocated by Thomas Jefferson and advanced by John Rawls. This perspective on citizenship upholds universal application of civil rights and informs modern federal court decisions. On the top right corner of the grid, the **Civic Republican and Communitarian** emphasis on **duty** highlights the moral obligations of citizenship outlined by James Madison, explicated by the local traditionalism of Alasdair MacIntyre, and articulated in the communitarian work of Michael Walzer. These duties are political and active in nature. Below this point, in the bottom right corner, the **Pluralist and Multiculturalist** focus on **membership** receives recognition. This membership is defined culturally, arising from a shared sense of inherited belonging and inherent allegiance

[60] John Rawls, *Political Liberalism* (New York: Columbia University Press 1996**).**
[61] Michael Walzer, *Spheres of Justice* (New York: Basic Books, Inc. 1983).
[62] Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press 1984).
[63] Iris Marion Young, *Justice & The Politics of Difference* (Princeton, N.J.: Princeton University Press 1990).
[64] William Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press 2003).
[65] Seyla Benhabib, *Democracy and Difference* (Princeton, N.J. : Princeton University Press 1996).

linking one's very identity to a distinct group. Both Iris Marion Young's radical democratic understanding of "the politics of difference"[66] and William Kymlicka's post-modern, liberal revisionist "multiculturalism"[67] provide the most recent articulation of the same regard for human diversity advanced by Horace Meyer Kallen, W. E. B. DuBois, and Malcolm X. Finally, the bottom left corner is the designated location for the **Participatory Republican** concept of **participation** explicated by Thomas Paine and refined by the discursive democratic model of Seyla Benhabib. Participation is an active form of social engagement that helps to define one's full status as a citizen in a democratic society. Benhabib insists that open and fair rules of participation help expand the parameters of a democratic society to empower and include persons previously consigned to the margins.[68]

Interestingly, the four cases chronologically presented in this dissertation may be interpreted to track the U.S. Supreme Court's legal treatment of religious minorities as it progressed around the external corners of this grid. The first decision in *Dartmouth College Trustees* presents a rights centered approach of treating traditional Protestant churches as non-profit corporations. Second, the Supreme Court advances the political obligations model of duty in upholding the parochial school system of Roman Catholics in the *Pierson Case*. Third, the Court favors the welfare of local community membership over the Sabbatarian claims of Orthodox Jews in the *Braunfeld Case.* Fourth, the Justices may consider national security policy's current impositions upon the full participatory citizenship of American Muslims if a case similar to *Tabbaa* is eventually granted certiorari. The Supreme Court seems to be advancing around the corners of this

[66] Young, *Justice & The Politics of Difference*, pp. 13-14.
[67] Kymlicka, *Multicultural Citizenship*, pp. 18-20, 26-33.
[68] Benhabib, *Democracy and Difference*, pp. 73-74, 79-80, 87.

philosophical grid as it seeks to redefine the nature of U.S. citizenship in the nation's plural religious environment.[69] However, the models of citizenship developed here remain simply descriptive. The final chapter will explore the normative implications of this unfolding pattern for the future of U.S. citizenship norms and Muslim Americans.

It must be stated that the two-dimensional Citizenship Grid can not capture the rich complexity of the subject cases and events. In reality, the four political perspectives on citizenship regularly overlap and intersect. In Chapters 2 and 7, the Citizenship Grid will be reformulated in three and four dimensions in an attempt to address additional issues. However, no model can fully illustrate the diverse interactions ever-present in reality. For this reason, these models proposed in this paper are presented merely as heuristic devices. They are presented in an attempt to provide greater clarity about the dialectical tensions inherent in the historic development of U.S. citizenship ideals and their interplay with the values presented by minority religious traditions. [70]

V. Contribution to Citizenship & Religious Studies

This dissertation is meant to fill the gap in the literature that exists regarding the tension between American citizenship and minority faith traditions. This dearth primarily results from the unique achievement of the U.S. Constitution's First Amendment, which

[69] Note that the U.S. Supreme Court's apparent movement around the Citizenship Grid in no way implies that further progress is necessary or inevitable. *See* Chap. 2, pp. 48, 81-82; Appendix II- Case Method.

[70] Richard Alba and Victor Nee, *Remaking the American Mainstream: Assimilation and Contemporary Immigration (*Cambridge,, MA: Harvard University Press 2003), p. 66. Methodological models remain approximations of reality, as they are too limited to capture the rich complexities and multivariate interactions ever-present in temporal existence.. Rather, they present theoretical devices which may assist social scientific analysis of empirical phenomena. As Richard Alba and Victor Nee have noted, the test of any theory is its' proficiency in organizing and interpreting previously discordant facts and unintelligible patterns.[70] My hope is that the Citizenship Grid and other models proposed in this dissertation will contribute to understanding the continuous interaction between secular principles and religious values which helped form U.S. citizenship ideals and mold American religious traditions.

intentionally separated church from state and thus, matters of conscience from the concerns of government. For this reason, many works on U.S. citizenship do not concentrate on religious faith. Recent studies, such as Noah Pickus's *True Faith and Allegiance,*[71] focus on citizenship and immigration or citizenship race, ethnicity, and nationality like Jeff Spinner's *The Boundaries of Citizenship.*[72] Others, such as Paul J. Weithman's *Religion and the Obligations of Citizenship*[73] and Jeff Spinner-Halev's *Surviving Diversity*[74] are grounded in political philosophy failing to give adequate attention to the nature and affect of religious traditions' reciprocal influence upon secular society and civic governance. While these thinkers provide useful insights, their projects fail to fully address the dynamic interplay between American citizenship and religion. As a result, the impact of minority religious communities upon the ongoing development of U.S. citizenship norms has remained largely unexamined. The important manner in which minority religious communities continually push secular citizenship concepts toward greater clarification and nuance, more extensive inclusion and democracy deserves to be studied.

This dissertation also answers the plea of Muslim scholars for an understanding of Islam within the context of American religious and legal history. In *Competing Visions of Islam in the United States,* Kambiz GhaneaBassiri makes just such an appeal acknowledging that American Muslims face the same difficulties as other religious

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[71] Noah Pickus, *True Faith and Allegiance: Immigration and American Civic Nationalism* (Princeton, N.J.: Princeton University Press 2007).
[72] Jeff Spinner, *The Boundaries of Citizenship: Race, Ethnicity, and Nationality in the Liberal State* (Baltimore, MD: Johns Hopkins University Press 1995)
[73] Paul J. Weithman, *Religion and the Obligations of Citizenship* (Cambridge: Cambridge University Press 2002).
[74] Jeff Spinner-Halev, *Surviving Diversity* (Baltimore, MY: The Johns Hopkins University Press 2000), p. 22.

outsiders including Catholics, Jews, and a host of others.[75] Such studies offer greater understanding of the challenges facing both U.S. Muslims and their fellow citizens.

For these reasons, my dissertation will critically examine the interactions between religious minority challenges, cultural negotiations, legislative reactions, U.S. Supreme Court decisions, and communal interpretations that lead to unfolding U.S. citizenship norms. The historic record will reveal the critical role of religious communities in the formation of American citizenship as these groups continually contest civic understandings of negative/positive rights, obligatory/privileged duties, inclusive/exclusive membership, or active/passive participation. These citizenship values will be analyzed in light of contemporary political theory. Current philosophers will provide insight into the critical citizenship elements and the principle policy aims raised. Finally, application of theory to the resulting legal petitions, as well as the U.S. Supreme Court's resolution and the American public's response, provides a greater understanding of the relevant citizenship issues as well as more responsive public policy.

In a world religious scholars increasingly describe as "desecularized" and reporters pronounce "wracked by religious violence," it becomes imperative to understand the interplay between national and religious membership. Post-September 11, U.S. public concern has been focused upon the patriotism and theological orthodoxy of Muslim Americans. History proves that the center of attention may be new, but the apprehensions mirror tensions which in the past swirled around minority Protestant factions, Catholics, and Jews. This dissertation develops new models with which to

[75] Kambiz GhaneaBassiri, Competing Visions of Islam in the United States (Westport, CT: Greenwood Press 1997), p. 187.

analyze the formation of citizenship ideals and the role that minority religions play in this process.

It is my hope that this exploration of past controversies over American citizenship and minority faiths will shed new light on patterns of interplay between American citizenship and minority faiths. This study aims to ease fears and bring reassurance that present challenges involving U.S. citizens and Muslim Americans will, over time, enrich both U.S. citizenship and Islamic faith. In the past, tensions between national membership and faith have ultimately resulted in the expansion of U.S. conceptions of citizenship and contributed unique theological understandings that enrich American life. Simultaneously, faith traditions confronted with new American patterns of life, often have been forced to reevaluate their theological expressions of meaning, purpose, and inclusion. Current events present us with an opportunity. Together, as U.S. citizens and members of distinct traditions of conscience, we possess the agency to either strengthen or undermine the human bonds which unify us.

V1. Dissertation Postulate

This four-part method is undertaken in an attempt to correlate the historic adaptations of religious communal norms to U.S. society and developing legal ideals of American citizenship with evolving sociological notions of religious membership and expanding political definitions of civic participation. My goal is to find normative bases for both American welcoming of Islam and Muslim integration into U.S. society.

It is my contention that Islam is only the most recent minority religious tradition to have gained the domestic numbers necessary to significantly affect, and thereby broaden

the development of American citizenship norms. Since the beginning of the Republic, religious groups have challenged the status quo of American life. As a result, American citizenship ideals have continued to expand unevenly beyond tolerance to inclusion, and toward acceptance. Today, there is evidence of a new developing norm involving active, integrative modes of interfaith dialogue and cooperative engagement. Religious communities have challenged American cultural norms of individualism, consumerism, and freedom from interference with various models of community, responsibility, and individual sacrifice for the common good. At the same time, republican values expressed in the Declaration of Independence and liberal norms established in the U.S. Constitution have required minority religious communities in America to examine their internal structures of authority, evaluate the viability of their orthodox beliefs, and consider disparate treatment perpetrated among their members. This dialectic interaction between American citizenship norms and minority religious values strengthens both our national and faith communities.

As official Constitutional interpreters of the interplay between citizenship norms and religious communal understandings, the U.S. Supreme Court defines the official parameters of government interaction with faith traditions and the limits of individual religious expression within the context of our common American citizenship. In the past, the principal issues facing minority religious groups were heresy, disloyalty, or difference. Conservative Protestant factions were challenged when their reforming theology and salvific aims clashed with the secular educational concerns of American liberalism. U.S. Catholics' creation of a parochial school system incited popular fears

concerning their political loyalties. Orthodox Jews met resistance when their commercial accommodations for *Shabbat* violated local blue laws.

In today's post-9/11 America, Muslims face all of these challenges at once. Necessary political understanding and useful legal strategies to meet these responses might result from examination of the past. There is much to learn from the study of how other American faith traditions weathered the demands and accommodations, misfortunes and opportunities, failures and transformations experienced in America.

Comparisons promise to reveal distinctive American patterns of ascriptive conformity and integrative difference. Although both official and popular citizenship norms rarely develop evenly, it will be interesting to discover if recognizable patterns develop. The ongoing negotiation of U.S. citizenship norms to include minority religious communities may have broader significance in a world currently plagued by religious conflict, ethnic unrest, growing refugee populations, and increasing immigration.

After detailed review of the surrounding context and the affect of federal court decisions upon American accommodations reached by the Abrahamic faiths,[76] we will return in the conclusion to an examination of Ian Markham's contention that Americans have discovered the public square to be enriched by an open dialogue between persons of all religions and beliefs. We will examine whether religious sentiments appear to have empowered religious minorities to address injustice and to challenge inequality.

While this dissertation will clearly demonstrate that U.S. pluralism and public receptivity of religious diversity have been a hard won achievement, the future trajectory of U.S. citizenship remains unclear. What is evident is that its future rests in the hands of the American public and the ideals by which they choose to conduct their daily lives.

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[76] *See* p. 9, footnote 10.

Chapter 2: A Methodology for Citizenship

Terrorist attacks around the globe, including the events of September 11, 2001, have spawned a renewed interest in the cohesive ties of citizenship in the United States. Since ancient times, the citizenship concept has been used to determine which inhabitants possess full membership in their community and thus, the power to politically participate in determining the collective's future. Defined with diverse emphasis by different civilizations and peoples, today citizenship refers to the individual's relationship to the modern nation-state. Periods of national crisis and state unrest tend to spawn heightened interest in understanding citizenship, as people attempt to strengthen the bonds that unite them as a defense against the chaotic forces which threaten division. We live in such a time.

Since the modern era, there have been many times when various religious identities have been at odds with civic ethos. Religion has been utilized as a means of excluding and justifying violence upon "others," in contravention of faith's own transcendent values and the civic norms of citizenship. Such violent interactions between religious ideals and civic ethos require a new lens of perception and thus, an improved means of evaluation. For these reasons, there is a pressing need for a methodology that explores citizenship norms within the context of the adaptations of religious minorities to new civic environments. As a nation-state which constitutionally separates church from state while concurrently protecting religious belief and exercise from state suppression, the United States possesses a legal tradition which has fostered religious tolerance and encouraged developing civic norms of positive engagement between faith groups. It is the purpose of this dissertation not only to explore the historic development of these civic

norms, but to identify the interacting elements that define democratic citizenship and the evolving civic norms that help create stable representative governance in a religiously diverse environment.

A. New Citizenship Model:

Through the course of U.S. history, distinct citizenship elements and civic normative tensions have consistently played a part in shaping the emergent identity of American citizenship. Often, minority religious groups have been instrumental in bringing these tensions to public notice through legal contests and demands for change. As revealed around key U.S. Supreme Court Cases involving minority religious challenges, historical shifts and socio-cultural turns in American citizenship norms consistently involve contested intersections between four citizenship norms: rights, duties, membership, and participation. Further, the high court's decisions and resulting popular responses concerning these normative interactions tend to move the American citizenship ideal toward either conforming assimilation or particularized integration.

Development of a two dimensional model will help illustrate the interaction of these elements through time. This Citizenship Square is the basic framework underlying the Citizenship Grid introduced in Chapter 1. **[*See* Figures B-1 & A-1]** It is my hope that this unique model will help sort through the different dimensions of citizenship in ways that not only will contribute to greater clarity about democracy, but also provide a means to achieve greater religious tolerance and more just governance.

A brief introduction of the foundational American citizenship model follows, with a more detailed explanation in the remaining sections of this chapter. Contemporary

theorists whose work exemplifies the unique elemental understandings of U.S. citizenship norms are introduced in an attempt to illustrate the strengths and weaknesses of these developing ideals. The concluding chapter applies and complicates this model to better address the historic experiences and fulcrum case of each minority religious community detailed in the next four chapters.

(1) The Citizenship Square: A Two Dimensional Model with Four Intersecting Axes

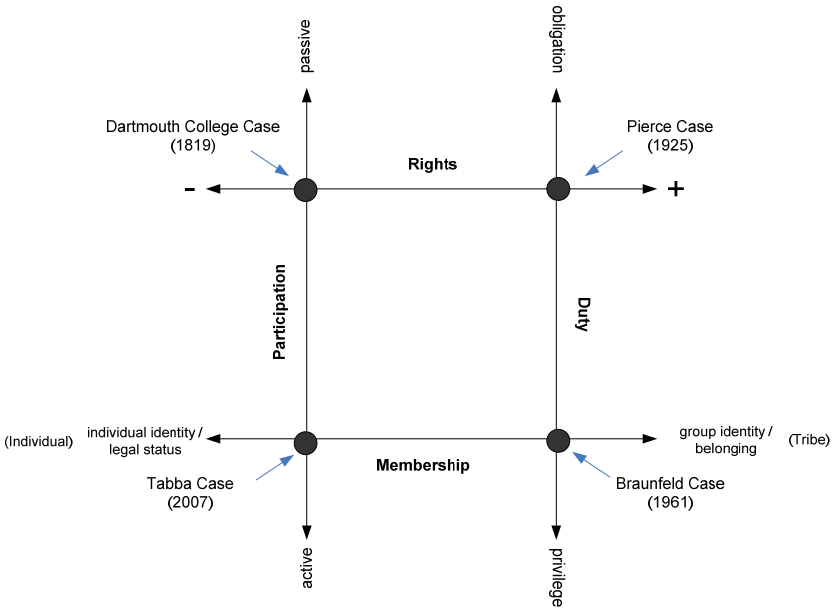
The philosophical writings of John Rawls, Michael Walzer, Alasdair MacIntyre, Iris Marion Young, William Kymlicka, and Seyla Benhabib support an understanding of American citizenship constituted on four interactive axes: rights, duties, membership, and participation. All of these theorists have made important contributions to the understanding of elements on the citizenship axis. However, none of them has provided a sufficient picture of American citizenship that addresses the full spectrum of interlocking tensions between these four crucial norms. My dissertation will synthesize their insights in order to bring a more comprehensive understanding of how American citizenship principles have and are developing.

While all of these axes continuously interact in the formation of citizenship, American constitutional history supports interpretation as an uneven unfolding toward ever wider understandings of citizenship achieved over time.[77] Key U.S. Supreme Court decisions on minority religious rights demonstrate that judicial focus on U.S. citizenship elements has

[77] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press 1977), pp. 105-130. Regarding the American people and their ultimate power to accept or reject federal court rulings, *see* Larry Kramer, *The People Themselves* (Oxford University Press, USA; New Ed edition 2005), pp. 35-39, 54, and 149. 196-200; Victor Rabinowitz, "The Radical Tradition of the Law," *The Politics of Law* (NY: Basic Books 3d ed. 1998), pp. 680-690, at pp. 683-686. Concerning litigation as a tool *see:* Kramer, *The People Themselves* (New York : Oxford University Press 2004), pp. 196-200 *and* James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 121 (1891) at p. 149).

shifted in uneven movements from the emphasis upon bestowal of citizenship rights, to an appreciation of civic duty, to demands for full membership, and to the current press for democratic participation as equals. However, it must be noted that this development must not be interpreted as inevitable.[78]

Two Dimensional Citizenship Square



[Figure B-1]

(a) First Axis: Individual Rights (The Founders, Liberal Jurists & John Rawls):

Since founding their nation, Americans have considered concepts of individual liberty and mutual independence essential to U.S. citizenship. Rights are perceived as insuring citizens' freedom from the outside interference of government. These rights include those explicitly enunciated in the U.S. Constitution, the Bill of Rights, and the various state constitutions, as well as those liberties determined by the courts to implicitly reside

[78] *See* Appendix II – Case Method for further explanation.

therein. Such freedom is believed to open the opportunity for individuals to develop the independent agency, self-reliance, and the fortitude to forge one's own future and the direction of one's nation. For this reason, rights are the first axes and upper left corner element on the citizenship square. Despite American social emphasis upon individual rights, some minority religious communities continue to contest for a collective understanding of group rights and to emphasize communal welfare with various degrees of success.[79]

In the early days of the republic, liberal citizenship ideals were rooted in the American Constitution and emphasized the negative right of every citizen to be able to pursue his/her own happiness free from government intrusion. These liberal notions of citizenship inspired the writings of Thomas Jefferson and James Madison, as well as informed Justice Marshall's decision to take a hands-off approach toward the Protestant evangelical trustees in the *Dartmouth College Case*.[80]

Protection of individual rights was perceived by U.S. founders and leading jurists as the **necessary first step** in the developing dialectic between American citizenship and

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[79] See *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) in which the Supreme Court affirmed the religious free exercise right of the Amish to withdraw their children from public schools after eight grade despite civic laws to the contrary. The high court's decision was based upon the religious belief that they must "remain aloof to the world." But see *Minersville School District v. Gobitis* in which the U.S. Supreme Court refused to recognize a religious right of Jehovah Witnesses children, enrolled in public school, to refuse legislative directive to salute and pledge of allegiance to the American flag. They overruled their own decision three years later. *Minersville School District v. Gobitis*, 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940) *overruled by West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L. Ed. 1628 (1943).

[80] *Dartmouth College vs. Woodward*, 17 U.S. (4 Wheat) 518, 4 L. Ed. 629 (1819**).** Writing for the majority, Justice Marshall refused to affirm the New Hampshire Legislature's attempts to unseat the originally chartered, evangelical Board of Trustees. Refusing to directly address the religious parties' conflicting claims for participation in Dartmouth College's governance, Marshall focused upon their contract rights. Viewing corporations as the legal means for protecting individual citizen-shareholder's interests, Marshall chose to protect the religious as well as economic rights of shareholders against state government interference. Relying upon the legal fiction that a corporation is treated like a person, Justice Marshall held that all corporations, like all persons, would be treated equally before the courts regardless of religious convictions. Thus, the federal courts would protect the individual contract rights of an eleemosynary corporation in the same manner as those belonging to individuals and "for profit" corporations.

religious membership. These same liberal values, emphasizing the negative right to be left alone, remain at the heart of John Rawls' modern conception of justice and judicial understandings of liberty. As America's most influential contemporary political philosopher on rights, Rawls' purpose is to provide theoretical assurance that all citizens are free to pursue their own notion of happiness. Through procedural justice, Rawls attempts to secure for every citizen fair and equal opportunity for individual agency.[81] Thus, Rawls captures the dominant U.S. norm of negative rights as freedom from government interference and autonomy of personal choice, which is depicted in the upper right corner of the citizenship square. In so doing, Rawls illuminates both the strengths and weaknesses inherent in this uniquely American understanding of the rights dimension of citizenship.

In *A Theory of Justice,* Rawls emphasizes justice rather than citizenship. However, his aim is to formulate neutral principles of justice which will protect the rights of individual citizens to pursue their personal conception of good. He reasons that issues of justice ("right") require neutral procedural determinations of objective answers. Such judgments may be universally reached and fairly decided. Because Rawls can empirically identify a competing plurality of goods, he knew that "good' remained a subjective choice about which reasonable humans could disagree. Rawls believes that individuals, provided an objective framework, can reach agreement upon principles of justice which will protect each person's right to conceive and pursue his/her own "good."[82]

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[81] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press 1999), pp. 347-350. Note that Rogers Smith labels Rawls a "universal integrationist" who promotes greater inclusiveness in public life by making institutions available to all, ending second-class citizenship of any kind, and creating a politics that supports greater inclusiveness in public life. Smith, *Civic Ideals,* p. 473.
[82] John Rawls, *A Theory of Justice,* pp. 347-350.

Rawls grounds his thoughts about justice upon implied notions of citizenship rights born out of the American political experience. Each individual citizen is presumed to be free and equal. Based upon this assumption, Rawls introduces procedural democracy designed to liberate citizens from personal biases, so together they can make consensual decisions about the principles of justice foundational to civil society. He introduces the hermeneutical device of a veil of ignorance which blinds all to self-interested outcomes and thus, allows them to reach impartial decisions. In this way, Rawls defends the individual liberties of the minority against sacrifice to utilitarian notions maximizing the majoritarian defined "good."

Through reflexive equilibrium, Rawls believes the citizens will reach two lexically ordered principles of justice. These framing principles equalize access to power, goods, and opportunity thus freeing individuals to pursue their personal concept of happiness. Specifically, the first principle of justice insists that all persons enjoy the greatest set of rights possible in a context where the same rights are afforded to all. The second principle of equality determines that any special office or privilege required by society may only be established if it meets the difference principle and then, the principle of equal opportunity. Specifically, the difference principle ensures that any resulting inequity will provide the greatest advantage to the least members of society. The principle of equal opportunity guarantees that everyone has an equal opportunity to compete for all special offices and privileges with society.[83]

Liberated by the framework these procedural principles of justice provide, Rawls believes individuals will pursue their free and equal opportunity to define the "good" for

[83] Rawls, *A Theory of Justice*, pp. 15-19, 118-123, 266-267, 349, *See* John Rawls, *Justice as Fairness: A Restatement*, E. Kelly, ed. (Cambridge, MA: Harvard University Press 2001), pp. 18-21.

themselves. For this reason, he refuses to impose a substantive definition of "good." Instead, he prefers a thin theory limited to political "primary goods." These primary goods are those resources necessary for full, egalitarian participation. In a nod to a positive notion of rights, Rawls asserts that these primary goods should be equally distributed to all persons prior to occupying the "original position." Then, all citizens will approach consensual decision-making about the principles of justice on an equal plane.[84] While Rawls insists that each citizen owes a "duty of civility" to use public reasons, his notion of citizenship continues to rest on individual rights and equality.[85] Ultimately, Rawls believes that morally constructed societies teach citizens to choose the "good" which benefits all people, not just themselves. Through such choices, individual citizens form a "social union of social unions."[86] Failing to adequately acknowledge group rights, he appears to believe that collective liberties will threaten individual freedom. For this reason, he bases his theory of justice upon the aggregation of each individual citizen's rights as opposed to genuine collective liberties.[87] Although his purpose in defining procedural rights was to assure each individual the liberty to define his/her own sense of "good," Rawls has been criticized for idealizing a form of citizenship which does not recognize that individual liberties are grounded within the citizen's particular cultural

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[84] In providing all citizens with primary goods before they determine principles of justice, Rawls acknowledges T.H. Marshall's argument that people can only be full members and functioning participants in the common life of society once their basic needs are met. It was Marshall's elaboration of the progression of modern citizenship through a triad of liberal rights from civil to political to social which became fundamental to the recent development of the welfare state. T.H. Marshall, *Class, Citizenship and Social Development* (Garden City, N.Y.: Doubleday 1964), See William Kymlicka & Wayne Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory, "*Ethics* (January 1994), pp. 352-381, at p. 357 *and* Derek Heater, *A Brief History of Citizenship* (Edinburgh: Edinburgh University Press, Ltd. 2004), p. 3, 113-114.

[85] Rawls, *A Theory of Justice*, p. 312.

[86] Rawls, *A Theory of Justice*, pp. 462-464. See *Justice as Fairness*, p. 21.

[87] Rawls, *A Theory of Justice*, pp 95-96, *See* Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, Inc. 1989), pp. 96-97; Eva Fedder Kittay, Love's Labor (New York: Routledge 1999), pp. 28, 104-105, 108.

community. His theories have been faulted for failing to understand how securely individual rights are rooted in the community.[88] As Robert Bellah has emphasized, this liberal constitutionalism was often at odds with the focus upon civic duty espoused by the earlier republican revolutionary document, the Declaration of Independence.[89] Communitarians have challenged Rawls to affirm deeper notions of communal membership than the political expression of the democratic nation-state. At the same time, critics accused Rawls of imposing upon others his own narrowly liberal comprehensive doctrine of procedural justice.

Acknowledging these critiques, Rawls modifies his views on citizenship in *Political Liberalism*. There he attempts to transform "justice as fairness" into a strictly political concept. Conceding that pluralism is inevitable and permanent, Rawls views constitutional democracy as providing the free institutions that permit individuals to have the right to exercise their human reason and the liberty to adopt conflicting comprehensive doctrines.[90]

Key to his analysis is the conception of citizen as a "political person."[91] Rawls refuses to undermine freedom of conscience or thought through an unbridled attempt to define the individual's moral nature. Rather, Rawls reserves that right to each individual citizen. For this reason, a citizen's agency is defined strictly in political terms while recognizing that each person possesses two powers of moral personality: reciprocity and responsibility. These moral powers allow the individual to engage in fair social

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[88] Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge: Cambridge, MA: Harvard University Press 1996) p. 14 *See* Richard Dagger, "Republican Citizenship," *Handbook of Citizenship Studies,* Engin F. Isin, and Bryan S. Turner, eds. (London: Sage Publications, Ltd. 2002), p. 153.
[89] Robert Bellah, "Religion and Legitimation of the American Republic," *The Robert Bellah Reader,* R. Bellah and S. Tipton, eds. (Durham, N.C.: Duke University Press 2006), pp. 253, 256.
[90] Rawls, *Political Liberalism*, (New York: Columbia University Press 1996), pp. 4, 36.
[91] Rawls, *Political Liberalism*, pp. 18, ftn. 20, *see also* p. xl.

cooperation and uphold the duty of civility foundational to civic friendship in a constitutional democracy.

Rawls understands individual rights to be based upon the ability to reason. So, he fails to fully protect persons who choose to follow religious communal dictate or personal conscience rather than their individual reason. At the same time, he does not adequately acknowledge the rights of persons who lack rational ability due to age, injury, or limited capacity.[92] In other words, the constitutionally protected rights of each citizen are based upon his/her willingness to interact fairly and responsibly with fellow citizens, receptively listening to and respectfully engaging their ideas. Rawls insists that individuals support their positions in civic debate with public reasons which appeal to all citizens, creating an overlapping consensus which provides a political bridge between their different comprehensive doctrines.[93]

Policy arguments must be defended with public reasons politically convincing to all citizens, regardless of their private particularity. In this way, public reasoned policy unifies and stabilizes society, as opposed to positions supported by sectarian doctrines which divide and polarize.[94] Through shared political consensus on justice, Rawls hopes to recreate a union of social unions defined strictly upon political agreement. This political union of social unions fosters the mutual respect, toleration and reciprocity necessary for social cooperation in the fair distribution of power and goods. Yet, can the rights of individuals exist without the collective support provided by communal duties and civic virtues?

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[92] Rawls, *A Theory of Justice*, pp. 14, 9-20, 34-40
[93] Rawls, *Political Liberalism*, pp. 14, 9-20, 34-40.
[94] Rawls, *Political Liberalism*, pp. 214, 252 and see also pp. li, lv, 34, 81.

In Chapter 3, consideration of the *Dartmouth College Decision*[95] will illumine the crucial role the negative definition of rights played in the American judicial separation of church and state. In the process, it will provide an opportunity to explore the tensions between majority demands for participation and the contractual rights of religious minorities in the early republic. Even as the democratic citizenry passed liberalizing laws, a conservative religious minority defended its right against intermeddling by the majority controlled legislature. The U.S. Supreme Court's emphasis upon freedom from government interference will be revealed as the basis for its resolution of the conflict between Christian Evangelical Trustees and Liberals for the right to control the college's governance. In exploring the *Dartmouth Case* and its context, the interplay between the participation concerns of a liberal majority and the religious rights claims of Evangelical Protestants reveal crucial normative tensions. This competition between liberal political values and religious morals to shape American civic norms remains as existent today as during the nation's Second Awakening.

(b) Second Axis: Communal Duties (Michael Walzer & Alasdair MacIntyre):

In contrast to Rawls's emphasis on negative individual rights, Michael Walzer and Alasdair MacIntyre stress the communal duties represented by the right side of the citizenship square.**[Figure B-1]** Appreciation for **communal duties** constitutes the **second step** in the negotiation of American citizenship by people of conscience. Alternatively perceived as negative or positive, individual citizens' rights undeniably rest upon the communal performance of collective duties.

Since the founding of the United States, liberal notions of individual rights have been challenged by civic republican insistence that the nation's existence requires citizens to

[95] *Trustees of Dartmouth College vs. Woodward,* 17 U.S. (4 Wheat) 518, 4 L. Ed. 629 (1819).

exercise democratic virtues and public duties. Robert Bellah maintains that the liberal constitutional emphasis upon private liberties and self-interested rights threatens the sense of citizenship and obligation necessary to sustain our democratic institutions.[96] More recently, communitarians have criticized liberal theories like those of Rawls for failing to understand how securely those rights are rooted in community.[97] In his defense, Rawls proposes a procedural liberalism that promotes individual rights as the means to unify disparate religious and ideological communities. Yet, communitarians and civic republicans emphasize the vulnerability of individual rights unsupported by communal norms of duty and virtue.

Michael Walzer questions whether individual rights can precede community defined notions of "right" and "good." For Walzer, individual rights exist only within the broader context of the community and its values. Within a shared common life, our sense of duty is formed. In *Spheres of Justice*, he asserts that together, cultural communities define all social goods, including justice and duty.[98] Walzer insists that one's sense of duty is forged within the concrete context of shared communal life.[99]

Relying upon Marx's understanding of humans as makers of meanings and materials, Walzer recognizes that goods are both socially constructed meanings and communally produced objects. These goods operate and have influence in different spheres of social life. Walzer attempts to establish principles of complex equality preventing any one

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[96] Bellah, "Religion and Legitimation of the American Republic," *The Robert Bellah Reader* (Durham, N.C.: Duke University Press 2006), pp. 259-263.
[97] Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge: Cambridge, MA: Harvard University Press 1996) p. 14 *See* Richard Dagger, "Republican Citizenship, *Handbook of Citizenship Studies*, Engin F. Isin, and Bryan S. Turner, eds. (London: Sage Publications, Ltd. 2002), p. 153.
[98] Michael Walzer, *Spheres of Justice* (New York: Basic Books, Inc. 1983), pp. 6-10. Regarding "duty: specifically, *see* p. 33.
[99] Walzer, *Spheres of Justice*, p. 33.

group of social goods to be used for acquisition of dominance over other groups/spheres of social goods. First establishing autonomous individual spheres of social goods, he insists that no person holding goods in one sphere may use those resources to acquire influence in another social sphere.[100] Walzer goes on to define justice as a special good which defines the boundaries between the spheres of the other social goods. [101]

In contrast to Rawls' universalism, Walzer is a particularist. He defends the right of local communities to define their own categories of social goods and to establish just boundaries between those spheres. Walzer argues that the liberal imposition of universal principles of justice upon other communities and cultures denies equal respect for their humanity and undermines their cultural independence.

In a later article on democracy, Walzer insists that "the civility that makes democratic politics possible can only be learned in the associational networks" existing within civil society.[102] Within the context of voluntary associations with family, friends and colleagues, we learn self-restraint, internalize personal responsibility, and accept mutual obligations which are all foundational to the development of democratic citizenship.[103] Through our active participation in church committees and civic organizations, we learn

[100] Walzer, *Spheres of Justice*, p. 19.
[101] Walzer, *Spheres of Justice*, pp. 9, 59-61.
[102] Michael Walzer, "The Civil Society Argument," *Dimensions of Radical Democracy: Pluralism, Citizenship and Community*, C. Mouffe, ed. (London: Routledge 1992), p. 104.
[103] Note that many religious communities contest identification with voluntary associations. Their reason is that membership in their collective is based not upon individual will, but compulsion under religious belief. For this reason, many scholars insist that human rights require that individuals be granted the right or agency to exit or terminate their membership in religious communities. *See* Johannes A. Van Der Ven, Jaco S. Dreyer, Hendrik J. C. Pieterse, *Is There a God of Human Rights? The Complex Relationship Between Human Rights and Religion, a South African Case* (Boston**:** Brill Academic Publishers 2005), p. 93. Note Political Economist Albert Hirschman identified the "exit, voice, and loyalty" as the triad of options available to contesting minority communities within larger economic-political communities. Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States* (Cambridge, MA: 1970), p. 126.

democratic practices by engaging in them.[104] Recognizing that many associations teach subordination and deference, Walzer prescribes a "critical associationalism" that reconstructs voluntary organizations "under new conditions of freedom and equality."[105]

Through Walzer's communitarian insights, we gain an appreciation for the shared values foundational to democratic duties, such as participation. Centered upon responsibility to others, duty to community may necessarily predominate over rights. Social ends may require citizens to perform their communal obligations without expectation of immediate return. Walzer doubts that a robust sense of duty can be established through Rawls'abstract principles. Rather, he insists that "people who do share a common life have much stronger duties." [106] It is Walzer's assertion that obligations of citizenship constitute a morality growing out of the shared meanings forged within our collective memberships. Absent a shared sense of duty and dues, Walzer argues that no political community exists for we lack any security or welfare. He insists that it is our shared sense of official duties and citizenly dues which generates political community. Together, citizens must debate civic choices and establish common ethical understandings.

Like many of the American founders, Alasdair MacIntyre is a civic republican who emphasizes civic virtues and public practices. While Walzer concentrates on community goods and social spheres, MacIntyre insists that citizens develop virtue and internalize their public duty by engaging in public practices defined by local traditions. In *After*

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[104] Walzer, "The Civil Society Argument," pp. 106-109. Here, Walzer's argument borrows from the earlier insights of Tocqueville. *See* Alexis De Toqueville, *Democracy in America* (Chicago: University of Chicago Press 2002).
[105] Walzer, "The Civil Society Argument," pp. 106-107. Kymlicka & Wayne Norman, "Return of the Citizen, "*Ethics*, at p. 364.
[106] Walzer, *Spheres of Justice*, p. 33.

Virtue, he insists that citizen conceptions of good must be embedded in living traditions that define virtue and in the public institutions that shape shared practices.[107] Distinguishing external goods (objects possessed by individuals) from internal goods (cooperative, social goods guided by virtues of intellect and of character as well as practices), MacIntyre argues that only internal goods benefit all members of the community, including the one in possession. MacIntyre develops a thick conception of "good" which includes a teleological understanding. For MacIntyre, internal goods are developed only through practices prescribed by the society's tradition and fostered by its' institutions. One engages in the community defined moral practices of citizenship not only to learn these practices, but to shape one's self into a citizen. In performing one's socially prescribed duties, one becomes a true citizen of his/her particular society. And, in the process, the individual is transformed into a member of an age-old social tradition. MacIntyre worries that Western culture is impoverished by its current emphasizes upon the economic value of external goods over the social achievement of internal goods.[108]

MacIntyre's theory supports a concept of citizenship securely grounded in the particular traditions, virtues, duties, and practices of local communities. Yet, it commands equal respect for all diverse citizenship conceptions based upon an appreciation for the shared importance of the basic social formation which each achieves.

As both Walzer and MacIntyre emphasize, the shared values of the community are foundational to citizenship because these norms define the duties citizens owe one another. These duties grow out of persons' involvements in associational network which they join out of concern for their fellows and a desire to improve their community. Duty

[107] Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press 1984), pp. 186-190, 192, 194.
[108] MacIntyre, *After Virtue* , pp. 216, 220-223, 225, and 243.

to the community is freely accepted as an integral part of being a citizen. Civic friendship entails the voluntary assumption of their obligations to others as the moral imperative.

Through acceptance of their communal responsibilities, citizens learn to internalize their civic duty to others rather than being externally coerced to meet imposed communal obligations. Thus, American citizenship norms entail more than just the right to independence and autonomy. As Walzer and MacIntyre insist, national membership must encompass responsibility for fellow citizens. For these reasons, duty as civic obligation constitutes the second foundational element of American citizenship, as portrayed by the upper right corner of the Citizenship Square and Cube. **[See Figures B-1 & B-2].**

In Chapter 4, the tension between minority religious demands for rights and popular attempts to impose duty will be explored within the context of the unanimous U.S. Supreme Court decision reached in *Pierce v. Society of Sisters.*[109] As the Catholic religious minority attempted to foster their faith through parochial educational system, they challenged the legislative efforts of Oregon's popular majority to instill patriotic duty through compulsory public school education. Basing its decision upon Catholic parental rights, we will examine how never-the-less the Court chose to support its ruling with record references to parochial school fulfillment of its civic duty. During an age of mass immigration, events surrounding the *Pierce Decision* reveal a religious minority's attempt to foster the faith education of its young and the illiberal public reaction which its efforts engendered. The struggle between Catholics for the right to educate its young and Oregon's legislative attempt to impose public school education would be replicated later in the ongoing contest over public aid to parochial schools.

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[109] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

(c) Third Axis: Membership (Iris Marion Young & William Kymlicka):

Membership has been variously understood as personal identity or status, belonging or allegiance. While the first interpretation focuses upon individual rights and universal principles, the second emphasizes communal duty and particularized cultural norms. Through the successful negotiation of rights and duties, citizens acquire the desire for **full membership** in both political society and communities of conscience. At times, tension exists between the expectations and requirements for national citizenship and membership in one's own religious community.

The pursuit of membership constitutes the **third step** in the usual process by which people of conscience acquire American citizenship. Full membership bestows both the privilege of belonging, as well as the obligatory duty to serve the community. It denotes not only the unfettered access to rights, the acceptance of duty, and the ability to actively participate in politics - but also public acknowledgment of full inclusion in the society.

Issues of group membership have inspired the citizenship writings of radical pluralists and liberal multiculturalists alike. These thinkers assert that minority groups are too often marginalized by the universalizing claims and democratic tyranny of the majority. Two such theorists are Iris Marion Young and William Kymlicka. Both political philosophers attempt to forge new understandings of citizenship that make room for difference and embrace excluded groups. For this reason, their particularized conceptions of citizenship tend to value communal membership and favor collective rights. Membership requires an expansion of duties beyond individual centered, preferential choices to community focused service to the life of the collective.

A very robust conception of membership underlies the work of Iris Marion Young, particularly her book *Justice and the Politics of Difference*.[110] Informed by Marxist thought and feminist critique, Young introduces "group-differentiated citizenship" as a radical substitution for the liberal notion of universal citizenship which stresses individual rights. She worries that attempts to define a universal citizenship fail to transcend group differences, but rather oppress historically excluded groups.[111] Broadly defining five forms of oppression, Iris Young insists that requiring citizens to abandon their particularity and adopt the national majority viewpoint is another form of domination.[112] Because the privileged tend to control the public, they have the power to define society's accepted universals and thereby marginalize other groups. This places "other" groups at distinct political disadvantage.

According to Young, genuine equality requires the affirmation of difference, not blindness to it. Her solution is a "politics of difference" that provides explicit recognition and representation of oppressed groups through institutionalized procedures.[113] Explicit political recognition, including guaranteed representation and veto power over decisions of direct affect, ensures that the voices of oppressed groups are heard in both the general

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[110] Iris Marion Young, *Justice and the Politics of Difference* (Princeton, N.J.: Princeton University Press 1990).

[111] Young, *Justice and the Politics of Difference*, pp. 13, 21, 47. 117-118, 120. According to Young,

> "Republican theorists insisted on the unity of the civic public: insofar aw he is a citizen every man leaves behind his particularity and difference to adopt a universal standpoint identical for all citizens, the standpoint of the common good or general will. In practice republican politicians enforce homogeneity by excluding from citizenship all those defined as different, and associated with the body, desire, or need influences that might beer citizens away from the standpoint of pure reason." Young, *Justice and the Politics of Difference*, p. 117.

[112] Young, *Justice and the Politics of Difference*, pp. 10, 60-61, 164. Note that Young has identified five forms of oppression which justify the granting of special rights to excluded groups as well as the relationship of such rights to theories of justice and democracy. Specifically, the five forms of oppression are: exploitation, marginalization, powerlessness, cultural imperialism, and random violence/harassment arising out of group hatred/fear. Young, *Justice and the Politics of Difference*, p. 64.

[113] Young, *Justice and the Politics of Difference*, pp. 47, 81.

assembly and the public square.[114] And, special rights ensure distinct group needs are met over such interests as language and land.[115]

Young recognizes that society is inevitably grounded in social groups and therefore, citizenship is informed by difference. [116] Accordingly, her "politics of difference" understands rights as rules regarding social relationships, not abstract individual entitlements**.** In a culturally pluralistic democracy, group-specific rights and collective policies must work together with universal civil and individual rights to insure all members are recognized as full participants. Insisting that there are no neutral norms or impartial parties, Young envisions a heterogeneous public in which differentiated citizens and groups work together to address their distinct needs free from assimilative compulsions and oppressive discrimination.[117]

William Kymlicka asserts that citizenship has never been the homogenous concept and universal construct that liberal theorists describe. Rather, liberals have always justified a system of group-differentiated citizenship in a system of nation-states bounded by territorial borders.[118] Kymlicka suggests that national identities emerged amidst group competition for power, creating the unity necessary for mass cooperation as citizens and establishment of government institutions. Nations proved incubators for liberal theory by providing domains of freedom and equality as well as institutions nurturing mutual

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[114] In order to insure the democratic expression of all interests and opinions, Young endorses "specific representation only of oppressed or disadvantaged groups." Young, *Justice and the Politics of Difference*, p. 187.
[115] Young, *Justice and the Politics of Difference*, pp. 175-183, 187. 191.
[116] Young, *Justice and the Politics of Difference*, pp.186-187. Note that Dr. Young defines social group as "a collective of people who have affinity with one another because of a set of practices or way of life, they differentiate themselves from or are differentiated by at least one other group according to these cultural forms." Ibid, at p. 186.
[117] Young, *Justice and the Politics of Difference*, pp. 93-94, 244-249. Note that Young's normative ideal is that of "city life", in which social differentiation is accomplished without exclusion or domination.
[118] William Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press 1995), pp. 88-89, 93,124.

recognition and trust, where competing values could be resolved. These institutions gradually evolved into the liberal democracies of today, which were unfeasible without a shared public culture.[119]

Unfortunately, national boundaries were defined by the territorial majority and so, often encompassed less powerful minority cultures. Kymlicka argues that these minorities not only should possess full national citizenship, but be afforded protective group rights. Rather than advocate radically restructuring of liberal institutions, Kymlicka simply adds these special group rights protecting minority cultures within the existing nation-state majority regimes of universal rights. He bases his position on the preservation of societal cultures which provide the diverse contexts necessary for individual choice and development of personal identity, both valued by liberalism.[120] Defining 'societal culture' in terms of history, territory, and language synonymous with 'nation', he significantly narrows the factors creating group rights. In this way, Kymlicka preserves the importance of group identity while clarifying and tightening the criteria for bestowal of collective rights. The result is not only a more manageable number of groups entitled to differentiated citizenship, but the liberal regularization of minority rights.[121] Kymlicka's 'multicultural citizenship' bolsters the liberal shortcomings of universal citizenship by protecting the particularity of minority cultures against infringement by the national majority through the auspices of the state.[122]

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[119] Kymlicka, *Multicultural Citizenship*, p. 83, 88, 105.
[120] Kymlicka, *Multicultural Citizenship*, pp. 82-83, 89, 105. *See* David Miller, Citizenship and National Identity (Cambridge: Polity Press 2000), pp. 102-103.
[121] Kymlicka, *Multicultural Citizenship*, pp. 6, 105. *See* Kymlicka and Norman, "Return of the Citizen," *Ethics*, p. 373, ftn. 26.
[122] Kymlicka, *Multicultural Citizenship*, pp. 89,

Criticizing Young for oversimplifying minority rights as an issue of official recognition, Kymlicka identifies the question as how to construct a definition of citizenship that fosters the cultural difference and communal understandings of national minorities. He concedes that the answer is determined as much by fear and prejudice as by moral sentiment and philosophical convictions.[123] Kymlicka argues that the public sphere should express the shared national identity of its citizens. At the same time, it must make room for group members to present their claims under the principles and precedents already embedded in their national political community.[124] He stresses the internal right of national citizenship which is growing increasingly diverse due to transnational migration.[125]

Under Kymlicka's theory, three types of group rights are specifically elaborated as special representation rights, polyethnic rights, or self-government rights. Special representation rights are designed as temporary measures to respond to disadvantaged groups. These group rights guarantee representation of marginalized groups until the society is able to remove the conditions which oppress them.[126] Within American governance, these special group rights sometimes are afforded through affirmative action when necessary to overcome inequalities wrought by past injustices. Polyethnic rights help immigrants express their cultural particularity without impeding their efforts to succeed in the economic and political institutions established by the dominant society. They consist of public funding for cultural associations and expression as well as special exemptions from laws and regulations that disadvantage their distinct way of life. Since

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[123] Kymlicka, *Multicultural Citizenship*, pp. 129-130.
[124] Kymlicka, *Multicultural Citizenship*, pp. 79-80.
[125] *See* Christian Joppke, "Multicultural Citizenship," *Handbook of Citizenship Studies*, E.Isin ad Bryan S. Turner, eds. (London: SAGE Publications 2002), p. 248.
[126] Kymlicka, *Multicultural Citizenship*, p. 32.

polyethnic rights are intended both to encourage cultural difference and to promote integration into the broader society, they remain permanent.[127] Such polyethnic rights are recognized when the U.S. government funds expressions of cultural particularity of certain ethnic groups, such as the Smithsonian Museum of the American Indian.

In contrast to the incorporation goals of special groups and polyethnic rights, self-government rights are claimed by national minorities who refuse to cede political control to the national majority. Mostly, these are indigenous peoples or distinctive nationalities, whose cultural history distinguishes them even as it situates them within the boundaries of a larger political community. Unlike disadvantaged or immigrant groups, national minorities do not seek inclusion but rather the right to govern themselves. Accommodation of national minority demands may lead to secession even as it relieves internal tensions. Such governance may be accomplishes through federalism or devolution of power to minority political units. Yet, Kymlicka readily admits that self-governance rights constitute a serious threat to the integrative function of citizenship.[128] His concerns have been realized when groups violently asserting self-governance rights clash with authorities, such as at the 1973 Protest at Wounded Knee.[129]

In opposition to Young, Kymlicka insists that a "politics of difference" is consistent with liberal principles of individual autonomy and social justice. While national citizenship necessarily provides cohesive identity and political stability, it must not be

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[127] Kymlicka, *Multicultural Citizenship*, p. 31.
[128] Kymlicka, *Multicultural Citizenship*, pp. 27-30, 192.
[129] As a result of the Native American activism including the 1873 protest and occupation of Wounded Knee, three major pieces of federal legislation were passed influencing Indian affairs: the Alaskan Native Claims Settlement Act, the Indian Self-Determination and Education Assistance Act, and the Act creating the American Indian Policy Review Commission. *See* *http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=ED178241&ERICExtSearch_SearchType_0=no&accno=ED178241* accessed on 4/13/2008.

abused to create majority domination or to justify discriminatory treatment of minority groups. Rather, it is best used to bridge religious, ethnic, and racial difference. Kymlicka demands that liberalism develop an approach to minority rights consistent with principles of freedom and equality.[130]

Both Young and Kymlicka emphasize the importance of membership and group identity to citizenship. More than legal status or abstract rights, group identity provides a relational basis for cohesion and unity.[131] While Young advocates restructuring our institutions to provide collective rights to oppressed groups, Kymlicka emphasizes that multicultural rights support social cultures which foster the autonomy and choice consistent with liberal government aims. Yet, Kymlicka warns that national identity may be abused by dominant majorities to exclude and oppress differentiated groups within a

[130] Kymlicka, *Multicultural Citizenship*, pp. 173-175, 193-195.

[131] *See* John Rawls, "Kantian Constructivism in Moral Theory," *Journal of Philosophy*, Vol. 77 (1980), pp. 515-572, at p. 540: "Although a well ordered society is divided and pluralistic … public agreement on questions of political and social justice supports ties of civic friendship and secures the bonds of association." Both Young and Kymlicka contest John Rawls assertion that shared ideals of justice are sufficient to cohere and unite citizens into one nation. Young, *Justice and the Politics of Difference*, pp. 20-22, 24-30. and Kymlicka, *Multicultural Citizenship*, pp. 174-176, *see* p. 174, ftn. 1. Rather, Young and Kymlicka emphasize the need for more tangible bases for share identity grounded in a common culture. Rogers Smith, author of *Civic Ideals* shares this belief. Smith warns that Rawls' theory supplies no clear basis for a compelling sense of distinct national identity. Because his "social union of social unions" fails to provide any unifying civic identity, Smith argues that Rawls's theory fuels the new surge of identity politics. Smith warns that absent an inclusive group identity, American history demonstrates that discriminatory, ascriptive ideologies fill the vacuum. While he agrees with Young and Kymlicka that shared civic identity must be formed upon a more solid basis, Smith charges that neither theorist has articulated one. Rogers Smith's answer is two-fold: (1) Americans must value their civic identity based upon the rich and unique democratizing history encompassing setbacks as well as triumphs of inclusivity; and (2) Americans must recognize their own collective part in forwarding this national identity, embracing their own commitment to actively preserve and expand the freedoms of all. Thus, Smith believes that American citizens may best be united through understanding and embracing their place in the unique ongoing historical enterprise of creating uniquely American, liberal constitutional democracy. Rogers Smith, *Civil Ideals: Conflicting Vision of Citizenship in U.S. History* (New Haven: Yale University Press 1997), pp. 483-484, 486, 487, 488, 490.

state's borders.[132] For both Young and Kymlicka, the focus upon membership of minority groups is a means to insure full democratic participation by all citizens.[133]

Though criticized as creating inequality and fostering diverse treatment, group-differentiated rights do provide an effective means of addressing the distinct needs of culturally excluded groups. Understood as membership, citizenship operates as a cohesive force which can integrate diverse individuals and distinct communities into a unified national unit. Yet, over-emphasis upon membership may limit individual agency and can lead to the deprivation of an individual citizens' or religious minority community's right to withdraw or isolate itself from civil society.

Chapter 5 will examine the U.S. Supreme Court's struggle in *Braunfeld v. Brown*[134] to define the legal limits of accommodating religious minority membership within the broader national community. This Sunday closing law case illustrates the membership choices which often arise when duties required by minority religious membership clash with shared community practices. The tension between religious duties of marginalized groups and the obligations of communally defined civic membership creates the backdrop for the Warren Court's resolution of the Orthodox Jewish merchant challenge to state blue laws. In the *Braunfeld Decision*, the Supreme Court Majority attempts to define the limits of majority accommodation of religious difference. In so doing, it highlights the parameters of American civic membership and its indirect toll on faith observances.

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[132] Kymlicka, *Multicultural Citizenship*, p. 195. Note that Kymlicka's fears cohere with those set forth by Rogers Smith, *Civic Ideals*, pp. 487-488 (cited in the preceding footnote).
[133] Young, *Justice and the Politics of Difference*, pp. 91, 248, 251-253; Kymlicka, *Multicultural Citizenship*, pp. 5, 131-134, 149-151, 191-192, 194.
[134] *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961).

(d) Fourth Axis: Active Participation (Seyla Benhabib):

Whether defined as legal status or group membership, public acknowledgment of democratic citizenship both motivates and obliges civic and political **participation**. Thus, participation becomes the **fourth and final step** in developing American citizenship. Tensions exist between an active participation that challenges accepted membership norms and passive citizenship that fails to supportively advocate for individual rights. In contrast to active civic engagement, passive participation bespeaks poor voter turn-out, slumping associational membership, and general expressions of political apathy.
In a democratic polity, citizens are expected to actively engage in public debate and election activities. Under such a governance system, passive participation appears to be a contradiction in terms.

Through her focus upon communicative ethics, Seyla Benhabib's work supports participation as the fourth elemental axis of citizenship. Benhabib advocates a discourse ethic foundational to deliberative constitutional democracy.[135] In *Situating the Self*, she rejects the efforts of "integrationists" who seek to reconstitute community by reclaiming integrative visions of fundamental values and principles. According to Benhabib, this model is incompatible with the principles of autonomy, pluralism, reflexivity, and tolerance basic to modern liberal society. Rather, she envisions a "participationist" community which emerges from common action, engagement and debate within the civic and public realms of democracies.[136]

Benhabib insists that democratic participation creates a public domain wherein the interaction between actors teaches the reason, reflexivity, understanding, and appreciation

[135] Seyla Benhabib, *Situating the Self* (New York: Routledge 1992), pp. 72-73.
[136] Benhabib, *Situation the Self*, pp. 11, 77-78.

for the viewpoint of others. Such attributes in turn hone the necessary skills of democracy, but may produce civic friendship and solidarity.[137] While participatory skills learned in the civic context support democratic political governance, such lessons may create tension within more traditional, authority-based religious communities. In minority faiths where exclusivity and obedience are the accepted order, democratic notions of inclusion and popular consensus may undermine the influence of religious leadership over their members.

Emphasizing reciprocal discourse and democratic engagement, Seyla Benhabib's work on participatory democracy may threaten traditional religious authority. Benhabib encourages deliberative processes which are fair and radically open to all persons, views, and issues while constraining harmful definitions of "good." Her theory opens the way for a truly democratic, participatory politics which is comprehensively reflexive, questioning all moral justificatory claims including its own.[138]

The discursive model enlarges participants' thinking through encouraging active listening, responsive dialogue, reflexive understanding, and cooperative engagement. In so doing, Benhabib asserts that the communicative process shapes the participant into autonomous individuals and democratic communities. Thus, she envisions legal institutions as embodying norms so abstract and general as to allow the flourishing of many diverse lifestyles and viewpoints.[139] In her theory, it is the public sphere which remains the crucial domain of interaction mediating between a democratic society's political institutions and private citizens.[140]

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[137] Benhabib, *Situation the Self*, pp. 11-12, 44, 74-75, 97, 105, 185.
[138] Benhabib, *Situation the Self*, pp. 9, 82.
[139] Benhabib, *Situation the Self*, p. 11-12, 44, 73
[140] Benhabib, *Situation the Self*, pp. 11-12, 54,

For Benhabib, every act of self-legislation not only serves to define the polity, but constitutes further agreement by the people to be bound together by law. Through political participation, people draw their civic as well as reaffirm their territorial boundaries. Through their civic involvement, members learn self-governance and distinguish themselves as full citizens. Genuine democratic rule affords this opportunity to all its citizens. Participation in self-governance entitles citizens to respect as both "bearers of human rights" and "authors of the laws." Concurrently, it signals their consent to be governed by the rule of law.[141]

As liberal democracies are becoming more internally diverse and accepting millions of migrating peoples, Benhabib believes that the U.S. ideal of citizenship may stand as a model. Presenting itself as the antithesis to *jus sanguinis* ideologies, the United States offers political membership based upon consent and civic membership. Through a process taking three to five years, legal residents may become U.S. citizens with proof of language competence, three years consecutive residence, proof of financial independence/ employment status, and passage of a civic competence exam. Yet, Benhabib is quick to note that these American citizenship procedures have too often been limited by arbitrary categories, inconsistent applications, and contradictory practices. She encourages active, political engagement which critically examines the history of our public institutions and comparatively evaluates our politics and jurisprudence.[142]

For these reasons, initial Muslim American reluctance to become involved in the public sphere or vocally denounce the activities of September 11, 2001 was viewed by many of their fellow citizens with condescension and suspicion. Further, such passivity

[141] Seyla Benhabib, *Transformations of Citizenship: Dilemmas of the Nation State in the Era of Globalization* (Amsterdam: Koninklijke Van Gorcum BV 2000), p. 40.
[142] Benhabib, *Transformations of Citizenship* , pp. 66-69.

circumvented contestation of the discriminatory policies restricting the basic liberties of the Islamic population, as will be described in Chapter 6. Since that time, Muslim Americans have engaged in unprecedented efforts to educate the public about their religion and active democratic participation in attempts to protect their rights. As the case of *Tabbaa v. Chertoff* demonstrates, Muslim Americans have not only embraced American ideals but have become increasingly active in asserting their Constitutional rights.[143] Through continuing participation in U.S. society, Muslim citizens have embraced America's democratic values even as their civic engagement discomforts the majority's national security concerns.

(e) Two-Dimensional Interaction Among the Four Axes of Citizenship:

Active participation brings the citizen full circle to a reexamination of the rights, duties, and identity defining his/her political membership as well as the opportunities to express that civic membership by actively engaging in the governmental process. Through civic involvement, participants learn the requisite skills and ideals which form them into self-governing citizens of these United States. The relationship between the four citizenship axes of rights, duties, membership, and participation are never static. Rather, they constantly interact to contextually shape and ideologically define the citizen and American citizenship. These values are repeatedly tested through the contestation of groups such as religious minorities. And in resolving such disputes, the U.S. Supreme Court continually establishes the civic normative content of such values through legal precedent

[143] *Tabbaa v. Chertoff*, No. 05-CV-582S, 2005 U.S. Dist. LEXIS 38189 (W.D.N.Y. Dec. 21, 2005), *affirming* 509 F.3d 89 (2d Cir. 2007).

All four of the citizenship axes constitute normative continuums. As explained above, each axis represents a crucial dimension of liberal, democratic citizenship: **rights**, **duty**, **membership**, and **participation**. Intersections between axes represent points of ongoing tension.

These cross sections, divisions, and movements around the two-dimensional citizenship box diagram illustrate further insights into the attributes and patterns of citizen formation within a liberal democracy. **[Figure A-1]** The movement around the outside of the box represents the uneven pattern of movement toward completion of yet another plane descending toward assimilation/conformity or ascending toward inclusion/welcoming. Vectors of passive attributes or active engagement with citizenship values inform the behavior of citizens and government institutions alike, including the U.S. Supreme Court. Parallel vertical understandings of individual values and shared group norms may further guide the actions of citizens and government decision makers. Finally, recognition that certain elements of citizenship concern legal analysis or civic synthesis may aid evaluation and progression toward a fully inclusive American citizenship, welcoming of individual rights/identity and communal duties/membership. All such evaluation, analysis, and progress will be tangibly concretized if accomplished within the fourth dimension of time.[144]

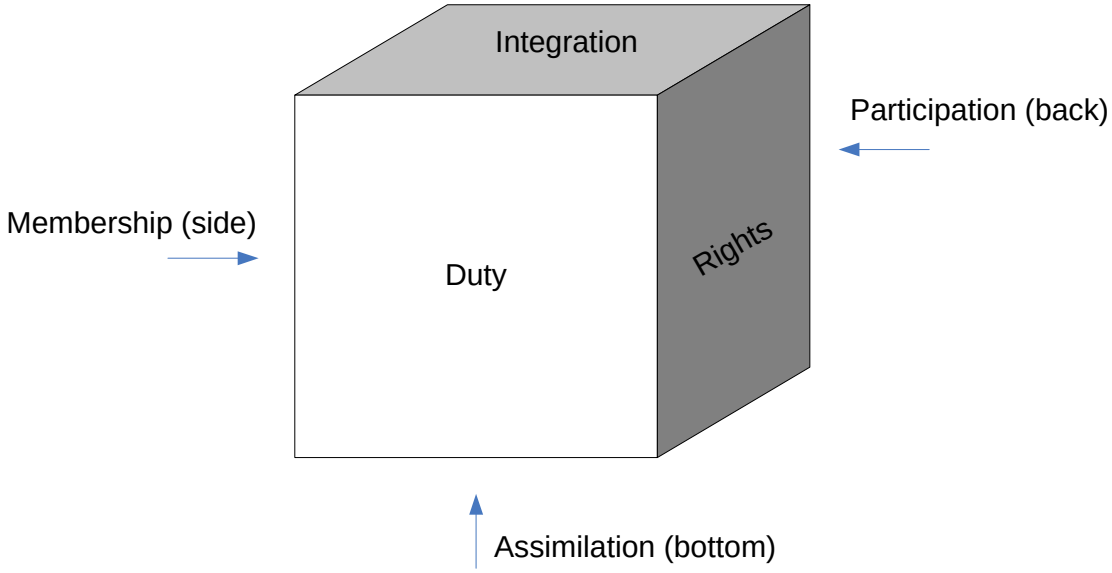
(2) Three Dimensional Citizenship: Six Intersecting Elemental Planes

The citizenship box may be depicted as a three-dimensional cube. **[Figure B-2]** For purposes of illustration, each axis represents a continual plane stretching infinitely beyond the points of their intersection at the various corners of the rectangle. These

[144] *See* (3) Fourth Dimension: The Time Continuum, p. 73 below.

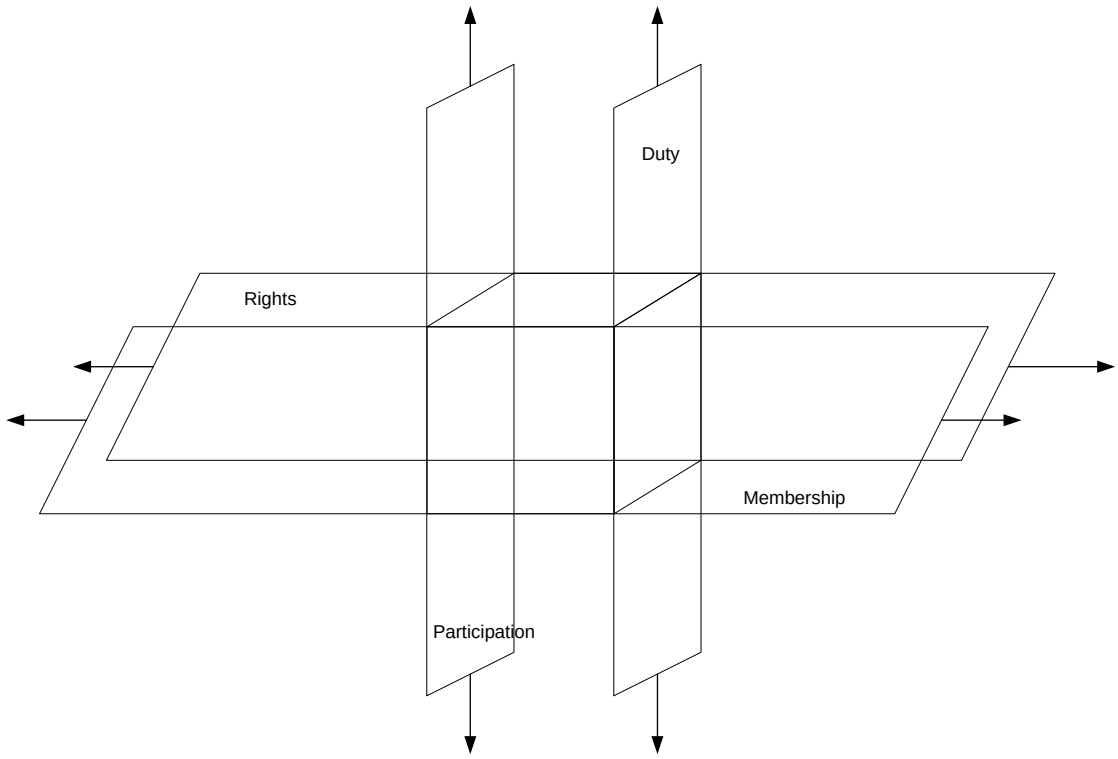
planes represent the citizenship norms of rights, duty, membership, and participation. **[Figure B-3]** Each of these norms constitutes a continuum between two extremes, with each corner representing the dominant American citizenship value upon its particular axis.

Citizenship Cube



[Figure B-2]

Planes of Citizenship Cube



[Figure B-3]

Rights may be understood on extending between extreme understandings of negative rights such as liberty and autonomy (the freedom to be left alone to choose for one's self) and equally drastic conceptions of positive rights (the freedom afforded by the provision for basic human needs). As elaborated above, John Rawls's theory and that of most liberal American jurists focus on the understanding of negative rights. Yet, neither Rawls nor these jurists advocate the type of extreme liberty and independence advocated to the autonomy horizon of the rights plane, preferring instead a more moderate stance that encourages the free choice of civic contribution. Other theorists, such as T.H. Marshall, have shifted the emphasis from negative rights as the basis for civil liberties to a fuller

appreciation of positive rights to political participation and social welfare.[145] Rawls's work postulates a procedural democracy which he asserts will provide all citizens with the liberty and equality necessary for full participate in deciding the "goods" pursued within their society.

Duty constitutes a separate, but intersecting plane which extends from conceptions of privilege to those of obligation. However, it is the obligation horizon which intersects with the rights axis and the privilege direction which intersects with the membership axis. In a democratic republic, persons engage in the civic practices defined by their accepted tradition. Through this public engagement, they become citizens who learn to govern their conduct and to assume communal duties out of esteem and concern for their fellow citizens. Free and equal individuals voluntarily accept these obligations because they benefit and strengthen the community as a whole. However, when duty becomes an external imposition and/or a compulsive requirement for communal membership, it is no longer a voluntary obligation. Rather, the coerced duty is the currency that must be paid for the privilege of group membership. Such a duty is not voluntarily given out of civic friendship, but required for the privilege of belonging.

The third intersecting plane of the cube is that of **membership.** It is a plane that extends from the boundaries of individual identity to the most complete understanding of group belonging. Within a rights society, individual legal status becomes an important moniker of individual identity. In a tribe, it is the conformity of belonging that defines members as encompassed within the group's conglomerate identity. Because duty defined as privilege denotes tribal identity and collective status, this end of the duty plane necessarily intersects the membership plane on the boundary of group belonging. The opposite horizon of the membership axis extends toward

[145] T.H. Marshall and T. Bottomore, *Citizenship and Social Class* (London and Concord, MA: Pluto Press 1992), pp. 8, 14.

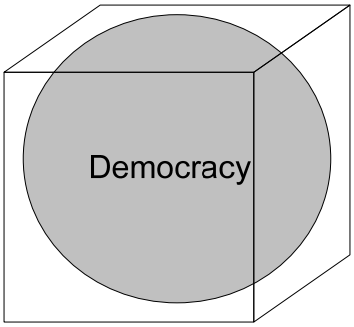
assertion of individual identity and legal status, necessarily intersecting the active end of the participation axis.

Participation constitutes the fourth intersecting plane. Forming the final side of the rectangular citizenship model, its horizons run from citizens' unconscious passivity to determined activity. Since belonging facilitates and necessitates active participation by individual members, the participation axis intersects the membership axis on the individual identity side of its continuum. At this intersection, active participation and civic engagement of individuals is a defining element of membership in American society. The opposite horizon of the participation continuum extends toward the negative side of the rights continuum. Since individual rights are viewed under the U.S. Constitution as inherent and inalienable, regardless of the individual's level of civic involvement, participation is denoted as passive at its end intersecting the rights plane.

Note that all four citizenship elements are necessary for the fullest realization of U.S. citizenship. When these constituent elements exist in perfect balance, their intersection creates the Citizenship Cube. The equal sides of this box illustrate the equilibrium among the citizenship elements represented by every side. The interior thus created is the optimal environment for liberal democratic governance depicted by a sphere. **[Figure B-4]** For reasons to be explained later, the cube embraces the perfect equilibrium of justice and equality, legitimacy and stability, liberty and friendship. However, if one element of citizenship is exaggerated or diminished over the other elements, the citizenship cube is no longer in balance and becomes a misshapen prism. This change in shape directly affects the amount of interior space which the box provides liberal democratic governance, which collapses the democracy sphere. **[See Appendix III, Figure D-10]** Again, the square cube represents the optimal shape providing the best

possible environment for just and equal, free and coherent, legitimate and stable, cohesive and integrated democracy.

Democracy Sphere
within the Citizenship Cube



[Figure B-4]

The final two planes of the three dimensional rectangle are formed by the base side of assimilation and the ceiling of integration. **Assimilation** represents conformity to a sameness that constituted the original foundation of citizenship in Greece. From Sparta to Athens, citizenship was understood as a political association of like-minded persons sharing civic virtues attempting to govern themselves in accordance with shared political ideals.[146]

The sides of the assimilation plane are bounded by the planes of the first four citizenship elements: rights, duties, membership, and participation. Its square shape represents the legitimacy and political stability which the proper balance of the elements of rights, duties, membership, and participation bring to a liberal democratic polity. Arguably, some shared sense for identity will always be necessary to anchor citizenship. In the past, this foundation consisted of shared appearance, race, or ethnicity as well as

[146] *See* Derek Heater, *A Brief History of Citizenship* (Edinburgh: Edinburgh University Press 2004), pp.2, 8, 28-29.

collective history, culture, and language. As Historian Rogers Smith asserts, the question remains whether a shared sense of citizenship may be derived from shared civic ideals.[147]

Yet, assimilation is only one in a continuum of flat planes that stretch upward toward the liberal democratic goal of the full integration of individual and group citizenship in the manner described by **Charles Taylor** as "deep diversity."[148] Below assimilation, outside the citizenship diagram box, lies a continuum of other collective identity forms which are increasingly insensitive to individuality, stretching toward greater regimentation and coerced conformity. As Martin Marty notes, totalism threatens to impose a single, easily defined ideology or creed upon every citizen without caring what happens to minorities or dissenters.[149] Kymlicka insists that the American form of citizenship stands on a foundation of assimilation stressing individual rights situated within a cultural mosaic and turning a blind eye toward group identity within a multivariate federation.[150]

At the top of the citizenship diagram box sits the plane of **integration**. This plane stretches continuously above the assimilation plane, one in a continuum of planes extended upward toward ever more inclusive models that welcome diverse group and individual identities into ever fuller forms of citizenship. From today's vantage point, full integration is the aim seen as the top of the diagram box. The question is whether complete integration is truly the overall goal that creates and stabilizes the citizenship

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[147] Rogers Smith, *Civic Ideals*, (New Haven: Yale University Press 1997, p. 483-484, 490-491.
[148] Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press 1992). For Taylor, "deep diversity" signifies multiple forms of belonging to a national polity. He proposes that persons be recognized equally as national citizenship, no matter what their specific ethnic or group identity. In this way, Taylor defines a middle way between unity and difference that promises to overcome fragmentation and achieve national unity without imposing uniformity. *See* Mark Kingwell, Practical Judgments: Essays in Culture, Politics, and Interpretation (Toronto: University of Toronto Press 2002).
[149] Martin Marty, *The One and the Many* (Cambridge: Harvard University Press 1997), pp. 10-11, 62.
[150] William Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press 2003), pp. 28-29, 59-61, 167

box into a unilateral square representing the most solid, balanced form of liberal, democratic citizenship. Or, is there a plane of inclusion above integration that provides greater liberty with a balanced, legitimate, and stable liberal democratic citizenship, without creating fragmentation? Such citizenship must not only provide all U.S. citizens with the optimal balance of rights, duty, membership, and participation but also be consistent with the full compliment of human rights from both a group and individual perspective.

(3) The Fourth Dimension: The Time Continuum

This three-dimensional citizenship diagram box/grid rests within a fourth-dimension which is the continuum of time. Both the western perception of time as linear[151] and the common law reference to developing precedent[152] tend to create the impression of progressive legal development. Indeed, some serious legal scholars such as Ronald Dworkin have interpreted constitutional law as "an unfolding narrative."[153] These

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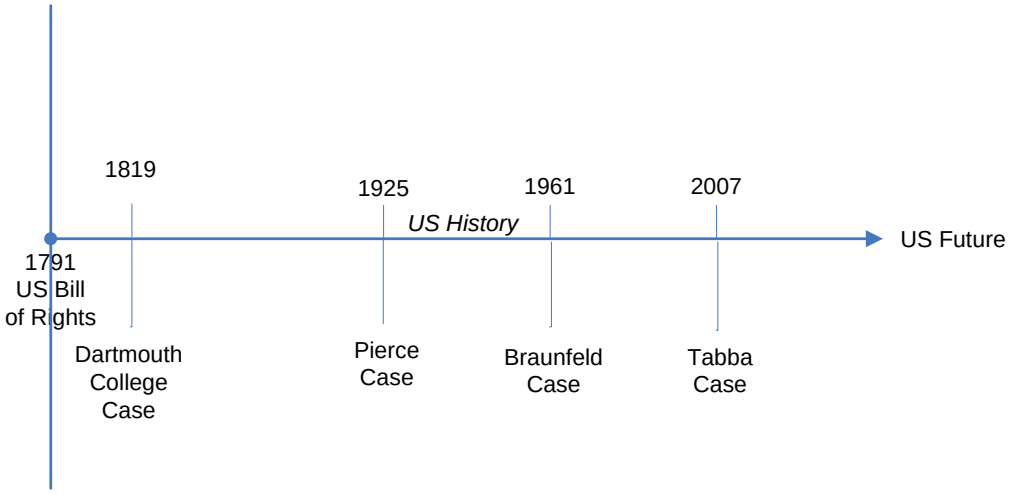
[151] Historian Thomas Cahill explains, the common human perception of time exists and continues either in an Eastern circular model of repetitive cycles or a Western linear model of historic progress. Thomas Cahill, *The Gift of the Jews: How a Tribe of Desert Nomads Changed the Way Everyone Thinks and Feels* New York: Nan A. Talese/Anchor Books 1998), pp. 53, 93-95, 130-132, 145-146, 247-249. Note that while this author is appreciative of Cahill's categorization of the cyclical and historic understandings of time, she does not fully accept his historic analysis which appears to be biased in favor Judaism and Christianity as opposed to other religious faiths.

[152] The Western linear understanding of time has become embedded in the common law. Based upon its inductive mode of reasoning, the common law system requires judges to decide case based upon principles derived from the relevant body of preceding decisions. The case is applied to the present matter to render a decision which becomes one more link in the chain of legal precedent. The binding of present judicial decisions to a preceding line of cases is thought to promote the legal values of consistency, coherence, efficiency, predictability, fairness, and equality. *See* Bruce G. Peabody, "Reversing Time's Arrow: Law's Reordering of Chronology, Causality, and History," 40 *Akron L. Rev*. 587 (2007), at 591; Alan Dershowitz, The Genesis of the Law (New York: Warner Books 2000), pp. 206-208, 212.

[153] Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press 1986), p. 225. *See* Brian Bix, *Jurisprudence: Theory and Context* (Durham, N.C.: Carolina Academic Press 2004), pp. 87-89. Note that in *Law's Empire* makes this statement about all legal claims. He then applies his "unfolding narrative" theory to Constitutional law in a recorded discussion with Bill Moyer. In that interview, Dworkin tells Moyers that the Founding fathers laid down constitutional principles which they then "assigned us the

theorists view judicial application of the U.S. Constitution to cases decisions as the gradual realization of the core principles embedded in that document.[154] The planes, intersections, and angles within the citizenship box/grid will be applied to the specific time periods of key legal decisions that changed the American perception of citizenship in response to the demands of minority religious communities and their faith-filled individual members. **[Figure B-5]**

Fourth Dimension of Time



[Figure B-5]

Through our historic review and theoretical analysis of these religious minorities' experiences with U.S. citizenship, we will explore whether a pattern emerges toward assimilation conformity or integrative weaving of minority religious communities into the

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rather daunting task of living up to them from our conscience. Bill Moyers, 5th Episode in 10-part TV Series," "Moyers: In Search of the Constitution," quoted by John Corry, "TV Reviews: The Constitution's Changing Story," NY Times (May 21, 1987) accessed at http://query.nytimes.com/gst/fullpage.html?res=9B0DE3D7123CF932A15756C0A961948260 on 4/13/08. According to Bill Bix's interpretation, Dworkin as indicating that "moral evaluation is integral to the description and understanding of law." Bill Bix, "Natural Law Theory," A Companion to the Philosophy of Law and Legal Theory, Dennis Patterson, ed. (Oxford: Blackwell Publishing, Ltd. 1999), pp. 223-240, at p. 237. *See also* Dershowitz, *The Genesis of the Law*, pp. 246-247.

[154] As Dworkin has analogized, the judge is like the author tasked with writing the most recent chapter in a "chain novel." While retaining creative license to reshape plot and character, the writer is remains restrained by the obligations of textual integrity and the need to cohere with the principles that have gone before. Dworkin, *Law's Empire*, pp. 228-32.

American citizenry. The models of citizenship which emerge from this study are offered merely as teaching aids for general audiences. They present a taxonomy which helps describe the social resolutions resulting from the studied cases. At times, one or more of the four foundational elements of citizenship may be exaggerated or constricted at the expense of the other three elements. This creates an imbalance among those elements, resulting in a diminution of the optimal space available for democracy. **[See Appendix III – Pedagogical Models, Figure D-10].** At other moments, public efforts may restore the balance in the citizenship elements, thereby restoring and stabilizing the best environment for popular democracy. Thus, the fourth dimension of time provides the theoretical citizenship grid with grounding in reality and the opportunity for concrete, positive application.

Yet, it must be stressed that the elemental development described in the U.S. citizenship model and expansion of the boundaries of American citizenship is not inevitable. While the American legal system rests upon a common law understanding, it would be a mistake to predict that U.S. law is engaged in inevitable progress. One has only to remember the *Dred Scott Case*[155] or the *Dow Case*[156] to be reminded that even federal courts, including the U.S. Supreme Court, have made decisions that have inhibited rather than advanced the inclusive horizons of citizenship. This dissertation describes the actual U.S. historic and legal record regarding the Abrahamic minority religions. The models of citizenship developed from this study graphically describe the

[155] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857) *superseded by* CONST. amend. XV (1868). In this case, the U.S. Supreme Court decided that a neither persons of African descent imported into the United States and held as slaves, nor their non-slave descendants could ever become U.S. citizens. Their decision was subsequently superceded by ratification of the Fifteenth Amendment.

[156] *Dow v. U.S.*, 226 F. 145 (4th Cir. 1915), overruling *Ex Parte Dow*, 211 F. 486 (E.D.S.C. 1914) *and In re Dow*, 213 F. 355 (E.D.S.C. 1914). In 1914, the Federal District Court in South Carolina ruled that Syrians were not eligible for U.S. citizenship because of their race. It would take a decade before this decision was effectively overturned and "Syrians" categorized as white, thus becoming eligible for American citizenship

elemental citizenship development and sociological trajectory of the existing case precedents. The final chapter will explore the normative implications of this historic unfolding for the future of U.S. citizenship norms and Muslim Americans.

B. Concluding Thoughts Concerning the Four Dimensional Citizenship Model

The various citizenship models help to illustrate that liberal, democratic citizenship is a living, breathing concept that not only moves within the continuum of time. Its boundaries are defined by the shifting conceptual planes which span the understandings of citizenship elements of rights, duty, membership, participation, assimilation, and integration. Affected by historic events and by cultural perceptions, these elements shift from one end of their spectrum to the other. In so doing, the balance between citizenship elements changes depending upon the tensions created and emphasis placed upon certain ones. The result is that the shifting alters the overall balance between citizenship elements and changes the volume of interior space available for liberal democracy. All the while, the entire three dimensional citizenship model continues to move upward toward democracy or downward toward tyranny. In this dissertation, the model will be used to aid understanding of U.S. citizenship norms as they were developed over time through legal, civic, social, and political responses to the demands of religious minorities. Our focus remains the historic challenges to American citizenship which have been presented by religious minorities. Each chapter will explore in turn the citizenship challenges created by the perceived heresy of Protestant groups, the separate educational demands of Catholics, the unique commercial practices of Orthodox Jews, and heightened participation by Muslims. As the chapters progress, the foundational issue of

citizenship may be seen to progress from rights to duty to membership to participation. Each one of these elements will be highlighted within the context of the historic plight of the religious minority which tested American perceptions of that specific citizenship element. And, in each situation involving a U.S. Supreme Court, that key decision represents the fulcrum which shifts the balance of change either towards or away from fuller integration of the particular religious minority as American citizens.

The concluding chapter will apply the four dimensional citizenship model to American law, citizenship, and the minority religious challenges to both. It will then explore the implications and ramifications of this study for the current American treatment of her Muslim citizens and their quest for full civic membership.

CHAPTER 3:
Disestablishment in the Constitutional Era:
Evangelical Protestant Rights & Liberal Participation
Leads to the Separation of Church & State (1787-1819)

Disestablishment under the American Constitution did not occur immediately upon ratification of the Constitution or the passage of the Bill of Rights. Rather, the separation of government from church and of citizenship obligation from religious dictate is a process which continues to this day. The U.S. Supreme Court's decision in *Trustees of Dartmouth College vs. Woodward*[157] constituted only the first step in the process of separating church from the state. It also illustrates how the high court initially resolved the tensions over participation and rights which emerged between the Protestant majority and citizens espousing less widely held beliefs.

As the key religious case of the Constitutional Era, the *Dartmouth Case* represents the Supreme Court's initial interpretation of the First Amendment nonestablishment clause. In order to fully understand the decision, it is first necessary to comprehend the significance of religious liberty to the American founders and their attempt to guarantee this freedom in the foundational documents of the United States. For this reason, we will initially explore the importance of religious liberty to the American Revolution and two of its key instigators, Thomas Jefferson and James Madison. We next examine their struggle to inscribe church-state separation and freedom of conscience in the new nation's Constitution. Then, we consider evidence of their success, which is recorded in the descriptive provisions of the Treaty of Tripoli ratified without debate by the Senate in 1796. Based upon this review, we shall study the dispute over the Dartmouth College charter between two Protestant groups, the original Evangelical trustees and their liberal

[157] *Trustees of Dartmouth College vs. Woodward*, 17 U.S. (4 Wheat) 518, 4 L. Ed. 629 (1819).

Christian-Republican challengers. Under Chief Justice Marshall's direction, the unanimous decision skillfully resolved the tensions between the liberal state majority's demand for participation in the college's governance and the original evangelical trustee's rights under the school's founding charter. Ultimately, the Supreme Court's *Dartmouth College Decision* both cemented American church-state separation and guaranteed religious freedom without embroiling the justices in the interpretation of religious doctrine. The Court accomplished this outcome by resolving the tensions with emphasis upon the secular right to contract.[158]

A. Religious Liberty Under The U.S. Constitution & Bill of Rights

Although the concept of government established through social contract appears in the Enlightenment writings of Hobbes, Locke, and Rousseau, the Americans Jefferson and Madison transformed this theory into a political reality. Before the American Revolution, the Greek and Roman concept of citizenship had largely been replaced in the West by the ideal of subjects loyal to the crown. Democratic rule by citizens versed in civic virtue had been transformed into feudal rule over vassals faithfully serving a monarch who claimed political authority from God.[159]

In fostering rebellion against colonial taxation by the British King, Thomas Jefferson turned to social contract theory in an attempt to justify the American Colonies' Declaration of Independence. As the major author, Jefferson drafted the document to

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[2] Note that the term "secular" means worldly or profane activities as opposed to religious or sacred ones. Only with the unfolding understanding of the separation of church and state articulated in the U.S. Constitution did the American people come to use secular to distinguish the activities of the state from the affairs of the church. *See* Mark D. McGarvie, *One Nation under God* : America's Early National Struggles to Separate Church and State (DeKalb, IL: Northern Illinois University Press 2004), pp. 165-173.

[159] Derek Heater, *A Brief History of Citizenship* (Edinburgh: Edinburgh University Press Ltd. 2004), pp. 24-29, 30-32, 42-45, 55, 58-64, 65-79.

assert that government existed at the behest of the people, who only surrendered so much power to their rulers as was necessary to create a social order protecting the people's God-given, inalienable "right to life, liberty, and the pursuit of happiness."[160] If King George himself violated this social compact by levying taxes without colonial representation, then the people had the right to take back control of the government.

Jefferson grounded this Declaration of Independence from the English monarch in the natural law of God. Through his opening references to "Nature's God" and "Creator," Jefferson appealed to a plural coalition of revolutionaries which not only included Anglicans, Presbyterians, and Congregationalists, but also evangelical Christians, Catholics, Jews, Deists, and secular humanists. His editing colleagues added two more references to a universal divinity: "the Supreme Judge of the world" and "divine Providence."[161] Through this Declaration, King George's colonial subjects transformed themselves from subjects into citizens, from obedient minions into autonomous agents, and from the objects of history into the creators of their own destiny. Jefferson successfully wedded the demand for independence to a shared conviction that Providence created humans for liberty and endowed them with equal rights of citizenship. Yet, it would take the success of the American Revolutionary War before his Declaration of Independence could shape a political state.

The Americans did prevail in their War of Independence against Britain. Upon their victory, the American colonies initially attempted a loose national alliance of independent states under the Articles of Confederation. When this alliance was threatened with

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[2] The Declaration of Independence para. (U.S. 1776), reprinted by The U.S. National Archives & Records Administration accessed at http://www.archives.gov/national-archives-experience/charters/print_friendly.html?page=d on 1/16/08.

[161] *Declaration of Independence*, para. 1, 2, 6. *See* Jon Meacham, *American Gospel* (New York: Random House 2006), p.73.

dissolution because of a lack of revenue and diplomatic cooperation, a Constitutional Convention was called in Philadelphia for purposes of drafting a new national charter. At the Philadelphia Convention of 1787, Thomas Jefferson was absent due to his diplomatic service in France. However, his influence would be felt through his prior writings and his mentorship of the Virginia delegate, James Madison. Both men were adamant about the need to draft a secular Constitution that protected the rights of individual citizens by separating the influences of church and state, balancing the powers of the various branches of government, and religious liberty. Based upon academic principle and personal experience, Jefferson and Madison both valued a constitution which would distance government from church authority and guarantee freedom of conscience.[162] Over time, variations in the two men's approach would lead to slightly different notions of the separation of church and state and therefore, distinct understandings of the moral foundations for American citizenship.

As a Deist and scientist who by necessity maintained a nominal Anglicanism, Thomas Jefferson remained a religious skeptic who valued liberty from government interference in matters of conscience.[163] Valuing independent rationality, he eschewed religious orthodoxy as the indoctrinator of simpletons.[164] Two years prior to the U.S. Declaration of Independence, Jefferson drafted the *Bill for Establishing Religious Freedom in the*

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[162] Both Jefferson and Madison were versed in Greek political philosophy and current European writings of such thinkers as John Locke, Jean Jacques Rouseau, and Montesquieu. Further, they had personally witnessed the harsh realities of religious discrimination and persecution. ***See*** James Morton Smith, *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1826* (New York: W. W. Norton & Company 1995), pp. 3, 18, 341-342.

[163] David Little,, **"**Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment," in *Conscience and Belief: The Supreme Court and Religion*, K. L. Hall, ed. (NY: Garden Publishing, Inc. 2000), pp. 269-284, pp. 119, 273.

[164] David Little, **"**Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment," in *Conscience and Belief: The Supreme Court and Religion*, K. L. Hall, ed. (NY: Garden Publishing, Inc. 2000), pp. 269-284, at p. 273.

State of Virginia. Asserting that "God hath created the mind free" and "that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness," he proposed that the Virginia General Assembly irrevocably "do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain their own opinions in matters of religion…"[165]

Disgusted by Anglican establishment and despising clerical orthodoxy, Jefferson sought to create a wall of separation between the Church and State.[166] Jefferson wanted to create a protective barrier around the inalienable individual right to freedom of mind and opinion which repelled governmental or ecclesiastical intrusion. Primarily, Jefferson sought to protect sound government from the irrational vagaries of religion as well as protect individual conscience from government.[167] However, a wall of separation did not, in his view consign religion to a private sphere separate from the public realm of politics.[168]

While Jefferson did not subscribe to religious doctrines nor appreciate clerical attempts to control human thought, he did value religion for its social utility as a moral educator of citizens and inhibitor of the radical proclivities of common people. Jefferson attempted to separate the dogma that he despised from the moral teachings of Jesus which

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[165] Thomas Jefferson, *A Bill for Establishing Religious Freedom in the State of Virginia,* Sec. I & II (1774).
[166] Letter to Danbury Baptists; Thomas Jefferson, *Virginia Bill for the Establishment of Religious Freedom*, Sec.; Boyd, *Papers of Thomas Jefferson*, Vol. 2, p. 545-546.
[167] Little, **"**Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment," in *Conscience and Belief: The Supreme Court and Religion*, K. L. Hall, ed. (NY: Garden Publishing, Inc. 2000), pp. 269-284, p. 273; Gaustad, *A Religious History of America*, (San Francisco: HarperSanFrancisco 1990), p. 119.
[168] Meacham, pp. 19-23.

he valued.[169] While he most valued Protestant Christian moral teaching, he did champion the religious liberty of Catholics, Jews, Muslims and other dissenting groups.[170] Religious morals, if not dogma, remained essential civic guidelines for a responsible citizenry. Ever the pragmatist, Jefferson judged any religion "substantially good which produces an honest life."[171]

Having made a serious study of religion at the institution that became Princeton College, James Madison held a personal faith in God and a deep empathy for matters of conscience.[172] Like his idol Jefferson, Madison valued religious liberty and advocated freedom of conscience from any imposition by government. Madison insisted that religion could only be directed by individual reason and conviction, and not by any use of external force or violence.[173] In contrast to Jefferson, Madison viewed personal faith as binding the human person with his Creator. For Madison, such faith was just as vital to the creation of ethical citizens as the moral guidelines supplied by one's personal faith. In fact, Madison insisted that the individual's relationship with the Divine is an inviolable right and a supreme duty which takes precedent over any requirement of temporal citizenship.

Thus, for Madison, separation of church and state was a jurisdictional demarcation rather than a theoretical wall preventing interference. Madison envisioned a "line of

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[169] Thomas Jefferson even went so far as to create his own version of the Bible by excising all passages but those of which he approved. Thomas Jefferson, *The Jefferson Bible* (New York: Holt 1995). *See* Little, *Conscience and Belief: The Supreme Court and Religion*, p. 273, 284, citing Letter from Thomas Jefferson to Thomas Lieper of 1/21/1809 in the Library of Congress.
[170] James H. Hutson, ed. *Founders on Religion*, (Princeton: Princeton University Press 2005), pp. 119-120, 130-131, 135-137; David Little, **"**Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment," in *Conscience and Belief: The Supreme Court and Religion*, K. L. Hall, ed. (NY: Garden Publishing, Inc. 2000), pp. 269-284.
[171] Meacham, p. 34.
[172] *James Madison on Religious Liberty*, p. 192.
[173] James Madison, *Memorial and Remonstrance*, cited in *Jews & Americans in the Public Square*, p. 101.

separation between the rights of Religion & the Civil authority, with such distinctness, as to avoid collisions & doubts on unessential points."[174] As an inalienable right, individual conscience was outside the purview of government's authority. Government must be blind to its citizens' religion or irreligion for the subject is beyond government cognizance.[175] Madison's aim was never to avoid the natural overlap of church and state because, like Jefferson, he saw religion as vital to the creation of an ethical citizenry.[176] Rather, he sought to prevent government from committing the tyranny of imposing its own will and robbing individuals of their inalienable, God-given right to free conscience.[177]

More understanding and sensitive in his views toward religious faith, Madison understood better than Jefferson the two-way protection afforded by separation of church and state. It was Madison who most fully articulated the benefits of separation for religious institutions as they were forced to compete for congregants within an open market of ideas. Not only would disestablishment free the state from religious hostilities and ecclesial interference, but religious institutions would be liberated from government regulation and oversight.[178] Further, Madison realized the protections which pluralism offered both in politics and in religion. A plethora of factions offered security from the political tyranny of an overwhelming majority and a guarantee against the imposition of

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[174] James Madison, "September 1833 Letter to Rev. Jasper Adams," *Religion and Politics in the Early Republic*, Daniel L. Dreisbach, ed. (Lexington: University Press of Kentucky 1996), p. 120; same metaphor used in "Memorial and Remonstrance," *The Papers of James Madison*, Robert A. Rutland et. al., ed. Vol. 8 (Chicago: University of Chicago Press 1973), p. 299.
[175] Vincent Phillip, Munoz, "James Madison's Principle of Religious Liberty," *American Political Science Review*, Vol. 97, No. 1, (Washington, D.C.: George Washington University 2003), pp. 17-32, at pp. 22-23, 25, 31.
[176] Corbett, *Politics and Religion in the United States*, p. 65.
[177] Munoz, p. 31.
[178] James Madison, *Memorial and Remonstrance*, para. 2-5, reprinted at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html on 1/16/08; Munoz, pp. .22-24.

religious orthodoxy by any fanatical groups. Absent an oppressive coalition among factions, pluralism of political and religious views offered a safeguard for individual rights and the basis for people of good will to live in social tranquility.[179]

Because of the concerted efforts of Jefferson and Madison, the U.S. Constitution drafted in 1787 was a secular document. Sometimes referred to as the "Godless Constitution," the United States' fundamental legal document differs from the 1776 Declaration of Independence in that it makes no explicit reference to God or a higher power. Legitimacy of the U.S. federal government rested upon the consent of the people and the rule of law rather than the sovereignty of God and the belief in theology.

The new document asserted the sovereignty of "We the People," transforming a loose confederation of states into a nation and converting members of states into national citizens. All of this was accomplished with only three passing allusions to the Divine, including the enumeration of its adoption in the specific "Year of our Lord," the Art. VI prohibition of religious tests for holding political office, and the assurance that persons might "affirm" their oath of office rather than "swear" their allegiance.[180] Rather than reliance upon the Almighty, the Constitution relied upon broad principles and governmental structure to secure the people's continued blessing of liberty.

The scheme of democratic representation, separation of powers, and checks and balances were all designed to prevent abuse of power. Federal governmental responsibilities were assigned to distinct branches and checked by one another's authority. The federal government was assigned specific duties, reserving for the states

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[179] James Madison, *Federalist No. 10* , ed. by Kramnick (NY: Penguin 1987), p. 126; quoted in *James Madison on Religious Liberty*, R.S. Alley, ed. (Buffalo, N.Y. : Prometheus Books 1985**)** pp. 189, 190-191

[180] U.S. CONST. Preamble, art. VI, sec. 3 & signatory clause (1787); see also Gaustad, *A Religious History of America*, p. 119.

whatever powers which were not specifically granted to the national government. Securing ethics of governance through secular legal mechanisms, the Constitution's drafters removed the Christian churches from their colonial role as guardians of civic morality and excised Protestant doctrine from public institutions. In their place, liberal constitutionalism and secular laws were designed to impose a common, public morality.[181]

While the delegates disagreed over the means to assure virtuous government, they readily agreed that a moral citizenry was essential. Unsure whether average American citizens were virtuous enough to maintain a republic over time, Jefferson and Madison reserved voting citizenship to white men on the supposition that their vested interest in property rights would motivate them to elect wise representatives to safeguard the individual rights of all. [182] Thus, they championed a limited, republican form of political citizenship and representative democracy rather than a pure democracy which directly implemented the will of the people. Rights of civil citizenship and equal standing before the law were guaranteed to all white men. However, African-Americans, Native Americans, and women were viewed as ineligible to join a unified people based upon prejudicial biases and discriminatory misperceptions about their abilities.[183] In this way, a schema of dominance and privilege survived despite general agreement among delegates that the Constitution must protect justice and equality for all.

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[181] McGarvie, *One Nation under God*, p. 66.
[182] *See* Richard Vetterli and Gary Bryner, *In Search of the Republic: Public Virtue and the Roots of American Government* (Totowa, N.J.: Rowman & Littlefield 1987), pp. 2-3, 185.
[183] John Wood Sweet, *Bodies Politic: Negotiating Race in the American North, 1730-1830* (Baltimore, MD: Johns Hopkins University Press, 2003) pp. 313-314; Dorothy McBride-Stetson, *Women's Rights in the U.S.A. : Policy Debates and Gender Roles* (New York: Routledge 2d ed., 1997), pp. 60-61.*But see* Thomas G. West, *Vindicating the Founders: Race, Sex, Class and Justice in the Origins of America* (Lanham: Rowman & Littlefield Publishers, Inc. 1997), pp. xiii-xv who attempts to explain these discrepancies.

Upon completion of the Convention's task, the proposed U.S. Constitution was sent to the states for ratification. Under Article VII, enactment of the Constitution required the affirmative vote of nine state conventions. It was within the context of these ratification conventions that the true battles over disestablishment were waged. While the Drafters had provided an innovative legal framework for relations between church and state without vituperative debate, the state ratifying conventions proved to be the site of heated confrontations between humanistic and religious factions. Humanist delegates believed that people could be moral without the necessary guidance of church or faith. Among the religious, the major concern was how to secure a citizenry sufficiently virtuous to manage self-governance without the moral tenets of religion.

Since the majority of these folk espoused Protestant Christianity, the state ratification debates often included discriminatory remarks against minority religions and fear of their political equality, much less potential leadership. As Colonel Jones publicly asserted at the Massachusetts Convention, "a person could not be a good man without being a good Christian."[184] At the same event, Mr. Singletary complained about the Constitution's failure to require political leaders to have "any religion" and advocated Protestant Religion as a criterion for political office which would ensure that "Papists," "Infidels," and other degenerates were ineligible.[185] Similar sentiments were voiced in all other state ratification debates, including the North Carolina Ratifying Convention. There,

[184] McGarvie, *One Nation Under God,* p. 52 citing James Madison's Notes as recorded by Jonathan Elliot, *Debates of the General State Constitutions on the Adoption of the Federal Constitution as Recommended by the General Convention in Philadelphia in 1787,* 2: 119 (Philadelphia: J.B. Lippincott 1904).
[185] McGarvie, *One Nation Under God,* p. 51.

Presbyterian Minister Caldwell warned that the prohibition against religious tests for office invited "Jews, Heathens, and Pagans of every kind, to come among us."[186]

Yet, by 1787, Jefferson and Madison's concepts of religious freedom and separation of church and state had begun to take hold. Advanced through the publications of *The Federalist*, their ideas became fashionable as Americans began to redefine themselves as autonomous, freethinking agents whose religious beliefs constituted a private matter of individual conscience unhampered by state interference.[187]

The remarks that carried the day in most state ratifying conventions were appeals to freedom of conscience, praise of toleration for diversity, and the need for separation of church and state.[188] Among the advocates for the Constitution, liberal and evangelical Christians joined secular rationalists in supporting the proposed documents' protection of liberty. Baptist Minister Abbott, liberal Judge Spencer, and Federalist Lawyer Iredell pressed for "religious liberty" on the grounds that "the divine author of our religion never wished for its support by worldly authority."[189] In New York, the "Federalist Farmer" asserted:

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[186] McGarvie, *One Nation Under God,* p. 51 citing Caldwell quote from Bernard Bailyn, ed., *The Debate of the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters during the Struggle over Ratification* (NY: Literary Classics of the U.S. 1993) Vol. 2, p. 902.

[187] Gaustad, *A Religious History of America*, pp. 119-123.

[188] Alexis de Tocqueville noted in his early sociological treatise on the United States that although there were three races present (African, Indian and European), citizens of European descent owned the majority of property and held power. He noted that white Americans regarded those of the other two races as inferior and deprived them of citizenship and rights. Regarding religion, he found six different Christian religions and factions, including Catholicism. Tocqueville described all Americans as sharing the one religion of Christendom. He made no mention of Judaism or Islam. While expressing concern about peculiar Catholic traditions, he expresses his conviction that Catholicism was progressing in the American environment of equality and respect. He believed that very soon all American religions would come to the same, democratized view of religion. According to Tocqueville, soon all Americans would share the same religion. Alexis de Tocqueville, *Democracy in America* (New York: Penguin Classics, 2003), pp. 340, 417-418, 421-423, 519, 919-920. Tocqueville's observations are instructive regarding the early American views of diversity. Advocating equality and respect for all people, many refused to afford full citizenship to Africans, Indians, or their descendants. Further, they advocated religious freedom for Protestant Christians even while openly expressing suspicion of the Catholic religion.

[189] McGarvie, *One Nation Under God,* p. 52 (ftn. 15)

> "There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed-a free and enlightened people, in forming this compact, will not resign all their rights to those who govern."[190]

And, in North Carolina, Rev. Spencer told his fellow delegates that "there are certain human rights that are not to be given up, and which ought in some manner to be secured."[191] This coalition of Protestant liberals and secular rationalists, championing, carried the day, with the U.S. Constitution being ratified by the requisite nine states in 1790.

Five of the states ratified the Constitution with the express understanding that a Bill of Rights would be enacted to explicitly protect their newly won freedoms from the intrusions of the national government.[192] Promises of such a bill of rights had been made by James Madison and other Federalists during several of the state ratification conventions in order to counter the Anti-Federalists' most persuasive argument - that the Constitution failed to explicitly protect individual rights. In fairness, the Constitution's lack of specific rights guarantees had been Jefferson's chief concern when he reviewed the draft Constitution sent to him by Madison in 1787.[193]

After ratification, James Madison took it upon himself to begin the process of drafting a Bill of Rights. As initially proposed, the first of the ten amendments passed specifically addressed freedom of conscience as well as religion, stating in Madison's words:

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[190] McGarvie, *One Nation Under God,* p. 54-55 quoting (ftn 22)
[191] McGarvie, *One Nation Under God,* p. 56 quoting (ftn. 22)
[192] These fives states are Massachusetts, South Carolina, New Hampshire, Virginia, and New York. Subsequent to U.S. Congressional approval of the Bill of Rights, Rhode Island also ratified the U.S. Constitution with the requirement of a bill of rights. *See* http://www.usconstitution.net/rat_ri.html accessed on October 24, 2006.
[193] McGarvie, *One Nation Under God,* p. 54 (ftn. 22)

> "The civil rights of none shall be abridged on account of religious belief or worship nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[194]

After much debate and editing by two separate committees, the religion clauses finally passed the First Congress on September 25, 1789 in the following form:

> "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof."[195]

This approval rested upon the shared understanding that the new central government would have no power to legislate on matters of individual liberty. While Jefferson and Madison sought to protect against any government interference in matters of conscience, many Congressional representatives believed that religious matters were exclusively within the purview of state governmental authority.[196] In fact, at the time the Bill of Rights was ratified, eight states officially endorsed Protestantism and one sanctioned Christian religion.[197] Many citizens viewed state oversight of religion as imperative to the moral health of the new republic. It would be 150 years before the United States Supreme Court, under the authorship of Justice Roberts, would apply the First Amendment to the

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[194] I *Annals of Congress* (Washington, D.C.: Gales & Seaton 1834), p. 452.
[195] I *Annals of Congress*, p. 948.
[196] Note that the Senate rejected the original House proposal for the First Amendment that "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." Madison had previously indicated that this was "the most important amendment." Yet, the Senate rejected it out of hand indicating their intent that power over matters of religion should remain with the current state governments. I *annals of Congress* at 452, 808; Linda Grant DePauw, ed. *Documentary History of the First Federal Congress of the United States of America*, 3 Vols. (Baltimore: John Hopkins University Press 1971), at 1:154-156; *See also* Robert A. Rutland, "Framing and Ratifying The First Amendments," *The Framing and Ratification of the Constitution*, L. W. Levy and D. J. Mahoney, ed. (New York: Macmillan Publishing Co. 1987), p. 314. Further, many of the States that ratified the Constitution had religious establishments at that time.
[197] The seven states officially favoring Protestant religion in some form were New Hampshire, New Jersey, North Carolina, South Carolina, New York, Vermont, and Massachusetts. Maryland endorsed Christian religion. *See* Appendix B to Edwin S. Gaustad, *Faith of Our Fathers* (New York: Harper & Row 1987), pp. 161-174.

state governments through the use of the Fourteenth Amendment.[198] Until 1940, American citizens' religious and other rights could be subject to state infringement without recourse to the protections guaranteed under the federal constitution.[199]

Most debate over the religion clauses occurred within the state ratification conventions. The leading concern was not the omission of Protestant truth claims, but the means for instilling the civic virtue considered necessary for self-governance. In the end, appeals for liberty from federal authority prevailed. On December 15, 1791, the Bill of Rights was ratified by the requisite number of state conventions. The newly approved First Amendment religious clauses now formed the basis for a federal government based upon secular laws, rather than religious piety. The foundations for morality and good citizenship were constitutional principles enacted by the people, rather than theological rules interpreted by the hierarchy. And, the people would be able to worship according to the dictates of their own conscience free from interference by the government. With approval, Madison wrote Jefferson: "I flatter myself [that] this country [has] extinguished forever the ambitious hope of making laws for the human mind."[200]

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[198] Reference is made to Justice Roberts majority opinion in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

[199] Initially, the Court applied the First Amendment protection of Free Exercise to the individual States in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).
From 1925 through the 1980's, the United States Supreme Court engaged in a gradual, case-by-case process of extending specific Bill of Rights protections against the states under the due process clause of the Fourteenth Amendment. Initially, the Court applied the First Amendment protection of Free Exercise to the individual States in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Seven yearts later, the Court employed Establishment Clause protections against the States in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed.711 (1947).
See Chapter 1, p. 16, ftn. 31 and p.24, ftn. 51 for further information regarding the "incorporation doctrine."

[200] James Madison, "Letter to Thomas Jefferson (January 22, 1786)" in *The Writings of Madison*, Gaillard Hunt, ed. , 9 Volumes (New York: G.P. Putnam's Sons 1904), 2:216 cited in both Gordon S. Wood, *The Radicalism of the American Revolution* (New York: A. A. Knopf 1992), p. 330 and McGarvie, *One Nation Under Law*, p. 73.

B. Treaty of Tripoli Declares the U.S. as a Secular Nation

Although "establishment of religion" was never formally defined, it is clear that the Bill of Rights in general and the First Amendment religious clauses in particular were meant to limit the powers of the federal government over private citizens. While modern accommodationists and separationists have debated whether establishment should be defined to narrowly prohibit governmental preference for a single religious faction or to broadly require total separation of church and state, it is evident that neither perspective was advocated at the time of the Bill's framing or ratification.

In fact, the evidence shows that First Amendment notions of disestablishment and religious liberty were so radically new that even the drafters struggled to fully understand their implications. Thus, for example, Presidents Washington, Adams, and Madison all proclaimed national days of Thanksgiving to God for the country's accomplishments. Only Jefferson refused to issue such proclamations based upon the prohibitions of the First Amendment, although a retired Madison retrospectively wished that he had followed Jefferson's example. Years later, Madison conceded that an official thanksgiving proclamation "seems to imply and certainly nourishes the erroneous idea of a national religion."[201] Various treaties with Indian nations approved Congressional funds for Christian missionaries to "educate and civilize" Native Americans, with Christian conversion viewed as a moralizing and mainstreaming endeavor. Again, Jefferson objected to these practices but accepted the treaties as expedient tools for westward expansion.[202]

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[201] James Madison, "Detached Memoranda," Elizabeth Fleet, ed. *William and Mary Quarterly* No. 3 (October 1946), pp. 561-562; see also McGarvie, pp. 59-60.
[202] Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (new York: Harper and Row 1969), pp. 293-294; Bernard W. Sheehan, *Seeds of Extinction: Jeffersonian Philanthropy*

Yet, the 1796 Treaty of Tripoli made clear the secular nature of the new federal government. Negotiated between the United States, the Pasha of Tripoli, and the Bey of Algiers for purposes of controlling the Barbary pirates, Article 11 of the text proclaimed:

> 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 Mussulmen; -and, as the said States never 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.[203]

This treaty was negotiated under President Washington, later endorsed by President John Adams, and subsequently ratified by the Senate with no recorded debate.[204]

Occurring just five years after the passage of the Bill of Rights, Senate approval of the Treaty of Tripoli provides evidence that the citizens of the fledgling United States understood themselves to be members of a secular state who's commercial and diplomatic efforts would remain unregulated by Christian doctrine and unhindered by religious prejudice. Popular understanding was that any persons, including Muslims, need

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and the American Indian (Published for the Institute of Early American History and Culture by University of North Carolina Press 21974), pp. 19-21 and 125-129. See also McGarvie, p. 60.

[203] *Treaty of Peace and Friendship between the United States and the Bey and Subjects of Tripoli of Barbary* (1797), Art. 11, http://www.yale.edu/lawweb/avalon/diplomacy/barbary/bar1796t.htm (accessed 11/2/2006). Note that while Art. 11 appears in the translation of Joel Barlow, the negotiating American diplomat, and was the official version of the treaty presented and ratified by the U.S. Senate (American State Papers, Foreign Relations, II, 18-19) printed in the *U.S. Statutes at Large* as well as treaty collections, it is inexplicably absent from the subsequent 1930 annotated translation of the treaty's Arab text. The important point is that the U.S. Senate ratified Treaty of Tripoli including Article 11 and that the Barlow English translation, not the Arabic version, was and is considered the lawful treaty whose terms bind the United States. *See* http://www.yale.edu/lawweb/avalon/diplomacy/barbary/bar1796n.htm#n4 (accessed 11/2/2006). *See* Meacham, pp. 103 and Paul Fregosi, *Jihad in the West* (Amherst, NY: Prometheus Books 1998), pp. 371-379 for further elaboration concerning the historical context and significance of the Treaty of Tripoli.

[204] Meacham, pp. 103-104; *See also* Fregosi, p. 376-377. http://www.yale.edu/lawweb/avalon/diplomacy/barbary/bar1796n.htm#n4 (accessed 11/2/2006).

not fear that religious opinions would prompt the intervention or hostility of the U.S. government. No official endorsement of religion would be allowed to disrupt the private worship of citizens, commercial relationships abroad, or international diplomatic efforts. No wonder Jefferson later contemplated:

> "with sovereign reverence that act of the whole American people which declare that their legislature would 'make no law respecting an establishment of religion or prohibiting free exercise thereof, thus building a wall of eternal separation between church and state."[205]

Instead of religion, public trust was placed in Constitutional safeguards and the rule of law to control human's venial nature.[206]

C. The U.S. Supreme Court's Decision Legally Separates Church from State

As the newly formed secular national government struggled to replace the old colonial establishment model, the judiciary became a key institution shaping the transition. The first Supreme Court Chief Justice John Jay was more conservative than either Jefferson or Madison and attempted to define the United States as a Christian nation, despite the religious clauses of the First Amendment. As a public official, he interpreted the federal

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[205] Thomas Jefferson, Draft Letter to the Danbury Association, 1 January 1802. Jefferson Papers, Library of Congress quoted in James H. Hutson, ed., *The Founders on Religion: A Book of Quotations* (Princeton, N.J.: Princeton University Press 2005), p. 62, with ftn. 11 making clear that the adjective "eternal" and several other phrases were later deleted from the final version of Jefferson's letter to the Danbury Baptist Association.

[206] James Madison wrote to Jefferson: "The inefficiency of the restraint [religion] on individuals is well known. The conduct of every popular assembly, acting on oath, the strongest of religious ties, shows that individuals join without remorse in acts against which their consciences would revolt, if proposed to them separately in their closets. When indeed Religion is kindled into enthusiasm, its force like that of other passions is increased by the sympathy of the multitude.… Even in its coolest state, it has been much oftener a motive to oppression than a restraint from it." James Madison, "Letter to Jefferson (October 24, 1787), *The Writings of Madison,* 5:30-31; Bailyn Debate 1:192-208; cited in McGarvie, p. 50, see ftn. 9.

laws to reflect generic Protestant morality.[207] Jay retained a life-long suspicion of any religious faction which he viewed as threatening religious liberty and was equally suspicious of Roman Catholics, Jews, and Muslims.[208] However, no case concerning religion came before the Court during his term as Chief Justice.

Rather, the most significant religion cases of those early years appeared before the Supreme Court during the tenure of Chief Justice John Marshall. And, it was Marshall who would strengthen the secular rule of law through the use of contract jurisprudence. Given Marshall's vigorous opposition to Jefferson and Madison in support of Patrick Henry's Virginia Bill on Religious Assessments, it was truly ironic that his later judicial tenure would yield the legal precedents translating the Constitutional religious liberty clauses into the reality of church-state separation.[209]

As a result of his own Anglican upbringing, John Marshall perceived the established church as a moralizing and stabilizing force upon civil society. While acknowledging the corruption inherent in the established church through his refusal to join vestry rolls or receive communion, Marshall still believed that a general Christian church establishment would benefit Virginians.[210] His personal witness of his father's influence as a vestryman, shared Christian worship space in his hometown of Leeds, and the impact of various

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[207] John Jay to John Murray, Jr., Oct. 12, 1816 in Johnston, *Correspondence of Jay* 4:393 cited in James H. Hutson, ed.; *Founders on Religion*, p. 60.

[208] John Jay to Jedidiah Morse, Sept. 4, 1798, Jay Papers (online edition), Columbia University Library, Columbia University Library accessed at http://wwwapp.cc.columbia.edu/ldpd/app/jay/image?key=columbia.jay.01078&p=1 on 7/21/2008 and cited in James H. Hutson, ed.; *Founders on Religion*, p. 43. McGarvie, *One Nation Under God*, p. 110. John Jay to the American Bible Society, May 8, 1823 in Johnston, *Correspondence of Jay* 4:489-490, cited in James H. Hutson, ed.; *The Founders on Religion*, p. 130. Walter Stahr, *John Jay* ((New York : Hambledon and London 2005), pp. 218-221, ftns. 54, 57, 60, 61,63.

[209] In his own words, Marshall supported "a small tax levied on property generally, for the support of ministers of religion, each individual being at liberty to declare the person to whom his contribution should be paid." Letter from Marshall to The Reverend William B. Sprague, July 22, 1828 (ALS, John Marshall papers, Earl Greg Swem Library, College of William and Mary in Virginia) quoted in Robert Kenneth Faulkner, *The Jurisprudence of John Marshall* (Princeton, N.J.: Princeton University Press 1968), p.140.

[210] Ibid.

Protestant preachers convinced him that an established church was a necessary moralizing force.[211] Thus, he supported Patrick Henry's Virginia Bill for Religious Assessments by voting against James Madison's motion to postpone the vote until the fall of 1785. Over resistance from Marshall, Madison ultimately passed the Virginia Act for Establishing Religious Freedom and thereby defeated Henry's religious assessment bill,[212]

Based upon his political opposition, it is understandable that Jefferson was less than thrilled with Marshall's appointment as Chief Justice of the United States Supreme Court by President John Adams in 1801.[213] A moderate Federalist, Marshall accepted the position as the Court's fourth chief justice with the goal of strengthening the U.S. Constitution and the fledgling national government.[214] Over his thirty-four year term as the head of the Supreme Court, he became known for his rulings which established the power of judicial review and the supremacy of federal over state law. [215] Yet, it was his

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[211] Leonard Baker, *John Marshall: A Life in Law* (New York: Macmillan 1974), pp. 9, 82, 751-752.

[212] By postponing the vote, Marshall inadvertently gave Madison and the bill's other opponents time to organize their resistance. Despite Marshall's negative vote, Madison's own motion passed the Virginia legislature with ease and Henry's Assessments Bill was soundly defeated in the next legislative session. On the heels of this defeat, Madison succeeded in finally passing Jefferson's Virginia Bill Establishing Religious Liberty Baker, *John Marshall: A Life in Law*, pp. 94-96; James E. Woodward, *Religion and the State* (Waco, TX: Baylor University Press 1985), pp. 29-32; *See also* Ralph L. Ketcham, James Madison and Religion: A New Hypothesis," *James Madison on Religious Liberty*, Robert S. Alley, ed. (New York: Prometheus Books 1985), p. 187.

[213] Jefferson once remarked that though defeated at the polls, the Federalists "have retired into the judiciary as a stronghold … and from that battery all the works of republicanism are to be beaten down and erased." Quoted by Albert Beveridge, *Life of John Marshall*, Vol. III (Boston: Houghton Mifflin Company 1916-1919), p. 21; *See* Faulkner, *The Jurisprudence of John Marshall*, p. 213, ftn. 19.

[214] Herbert A. Johnson, *Chief Justiceship of John Marshall, 1801-1835* (Columbia, S.C.: University of South Carolina Press 1997), pp. 10, 15; .Harry N. Scheiber, "Constitutional Structure and the Protection of Rights," in *The United States Constitution* (A. E. Dick Howard, ed. (Washington, D.C.: Smithsonian Institution Press 1992), p. 194-195. *See also* Elder Witt, *Congressional Quarterly's Guide to the U.S. Supreme Court* (Washington, DC: Congressional Quarterly Inc. 1990), p. 804.

[215] John Marshall was appointed as Chief Justice by President John Adams in 1801 and served until his death in 1832. "Biography of Chief Justice John Marshall, 1755-1835" at The John Marshall Foundation http://www.vba.org/jmfinfo.htm#title2 accessed on 1/31/08. *See* respectively *Marbury v. Madison*, 5 U.S. 137 (1 Cranch 137), 2 L. Ed. 60 (1803); *M'Culloch v. Maryland*, 17 U.S. 316 (4 Wheat. 316); 4 L. Ed. 579 (1819). *See also* Baker, *John Marshall: A Life in Law*, p. 665.

1819 decision in *Trustees of Dartmouth College vs. Woodward* which would affect permanent separation of church and state within the U.S.[216]

D. *Trustees of Dartmouth College vs. Woodward*

The *Dartmouth College Case* had its origins in a dispute between the state chartered school's President and its Board of Trustees. In the aftermath of the Second Awakening, increasing pressure was placed upon the college administration to provide conservative evangelical influences on campus. Dartmouth's trustees gave in to this pressure. By 1804, a majority of the Dartmouth College Trustees were aligned with the orthodox resurgence. Banding together, they appointed an orthodox professor of divinity and backing the moralizing demands of the more religious students. Opposing this action, the college president refused to intervene when liberal students rioted on campus against the growing restrictions. Such actions brought the conflict into the public arena. The dispute between Dartmouth's liberal President John Wheelock and the conservative evangelical Board of Trustees initially resulted in Wheelock reporting the matter to the New Hampshire legislature for investigation. In response, the trustees dismissed Wheelock and named a new college president.[217]

Around this time, Republican William Plummer campaigned for New Hampshire governor by voicing his opposition to the evangelical revival which he claimed threatened the liberal ideals of the American Revolution. Upon his victory, Governor Plummer immediately sponsored a bill to restructure Dartmouth College. The result was a series of statutes that increased the number of Dartmouth's trustees, gave trustee

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[216] *Trustees of Dartmouth College vs. Woodward*, 17 U.S. (4 Wheat) 518, 4 L. Ed. 629 (1819).
[217] McGarvie, pp. 164-169.

appointment power to the governor, and created a board of overseers directly appointed by the governor to administer the college. Most significantly, the legislature changed the charter of the college from freedom of religious denomination to recognition of total religious liberty for all officers and students, with the exception of theology school faculty. As conservative evangelicals, the sitting trustees reacted with a resolution rejecting compliance with the statute and removing William H. Woodward, the liberal college secretary and treasurer who remained a Republican supporter of Former President Wheelock. However, another law allowed newly appointed trustees to sit as a quorum, thereby conducting college business without the intervention of the older conservative trustees. When these new trustees reappointed liberal Secretary/Treasurer Woodward, the former trustees filed suit against him for return of college records and against the legitimacy of recent legislative acts.[218]

Working its way through the various court systems, *Trustees of Dartmouth College vs. Woodward* reached the United States Supreme Court in the year 1818. By this time, the case was the object of national scrutiny. Its decision would not only determine whether liberal republican or conservative religious influences would prevail at Dartmouth College, but also would resolve which forces would shape key American institutional structures and therefore, civil society in the future.[219]

As the Chief Justice, Marshall presided over the oral arguments and decision-making process in the *Dartmouth Case*. His Federalist leanings and those of the judicial majority made them more receptive to the Trustees' evangelical concern for morality, order, and stability upon the Dartmouth campus than to the liberal oppositions' secular Republican

[218] *Trustees of Dartmouth College* , 17 U.S. 518, at 626-627; McGarvie, pp. 168-172.
[219] McGarvie, pp. 165-173; Herbert Alan Johnson, *Chief Justiceship of John Marshall, 1801-1835* (Columbia, S.C.: University of South Carolina Press 1997), p. 176.

demands for modern curricula and greater student freedom. Yet, they were painfully aware that Dartmouth was the sole college in New Hampshire state-chartered and entrusted with the education of the state's youth. So, Marshall postponed the Court's decision until the following term.[220]

When the Supreme Court's holding was read the next session, it applied prior contract law precedent to establish a new doctrine protecting the voluntary associations of churches and charities from state government interference when they incorporate. Relying upon the contract clause of the U.S. Constitution,[221] the Supreme Court held that the state charter incorporating Dartmouth College was an inviolable, legally binding contract which could not later be unilaterally altered by the New Hampshire Legislature.[222] The State of New Hampshire was held bound to uphold the original

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[220] McGarvie, p. 172; Johnson, *Chief Justiceship of John Marshall, 1801-1835,* p.176-177.

[221] The Contract Clause of the U.S. Constitution specifically states:

> "*No State shall* enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or *Law impairing the Obligation of Contracts,* or grant any Title of Nobility. [Emphasis added.]

U.S. CONST. art. 1, §10, cl. 1. (1787).

[222] *Trustees of Dartmouth College vs. Woodward*, 17 U.S. (4 Wheat) 518, 4 L. Ed. 629 (1819). applying *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136; 3 L. Ed. 162 (1810).
(1810) and *Terrett v. Taylor*, 13 U.S. 43, at 49; 3 L. Ed. 650 (1815): "A private corporation," says the Court, "created by the legislature, may lose its franchises by a misuser or a nonuser of them; and they may be resumed by the government under a judicial judgment upon a quo warrant to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government, may be abolished. In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, &c. the legislature may, under proper limitations, have a right to change modify, enlarge, or restrain them, securing, however, the property for the use of those for whom and at whose expense it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in

charter's grant of independence and oversight to the initial college trustees. Despite the fact that the charter was granted by the English Crown prior to the American Revolution and only resulted to New Hampshire by virtue of victory in the War of Independence. What is more, charters were typically granted by the Crown to pursue public works on its behalf. Now, the U.S. Supreme Court was construing the original charter as a contract that created a private, eleemosynary corporation free of government control or intervention.[223]

The legal requirements of state incorporation included statements of legal purpose, the filing of corporate records, and regular accountings to the state. And, the Supreme Court emphasized, by meeting these requirements private corporations clarified their legal goals and commitments to potential donors and the public. Thereafter, private corporations had a protected right under the contract clause of the U.S. Constitution to endeavor toward these commitments absent breach of the general peace or public law.[224]

The impact of the *Dartmouth Decision* upon church and state relations in America was profound. Suddenly, private voluntary associations including denominations and charities could incorporate and thereby, gain the freedom to pursue their own vision of American civil society free of state interference. The decision enforced contract law in a manner that established separate realms for state and church pursuits. While the state might be able to enforce public laws and engage in civic endeavors, churches and other private institutions (including businesses) were given the liberty and protection to follow their

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resisting such a doctrine." In construing U.S. CONST. art. 1, §10 (1776): "No state shall …pass any bill of attainder, ex post facto law, or law impairing the obligation owing to contracts." *See* McGarvie, p. 173.
[223] *Trustees of Dartmouth College vs. Woodward*, 17 U.S. (4 Wheat) 518, at 629-634 (1819), pp. 629-634. Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 4th ed. 2005), pp. 47-49; McGarvie, p. 176. Note that an eleemosynary corporation refers to a charitable corporation.
[224] *Trustees of Dartmouth College* , 17 U.S. 518, at 644-645, 648, 675-676.

own private rules and pursue their own distinct visions for American society so long as they were legally incorporated. All corporations shared these freedoms and rights equally, regardless of their doctrine or degree of public support. The State was affirmed as the appropriate locus for governance and public policy making, free of private or church intervention. Concurrent with this disestablishment, government was charged with the responsibility to protect the equal rights of private religious corporations to protest, lobby, and proselytize for social changes consistent with their private organizational beliefs.[225]

The *Dartmouth Decision* was part of the American transition from the colonial model of shared responsibility for public needs between government and church to the liberal republican model. Public governmental responsibility for social welfare was now distinguished from private church efforts directed toward charity and conversion. Neither federal nor state governments any longer could delegate social services to private concerns without loosing control over how these independent entities performed their duties. For this reason, states began to establish governmental funds and administrative offices to pursue public needs agendas. And, churches and other private corporations were free to establish and govern parochial schools and social service institutions according to their own dictates.[226]

The result was a dual system of state universities and private colleges as well as public social services and private charitable organizations. Contract law, rather than constitutional principles of religious freedom, became the determining factor freeing

[225] McCloskey, pp. 48-50; McGarvie, *One Nation Under God*, pp. 156, 173-178, 188.
[226] McGarvie, pp. 187-188

courts from the need to evaluate social policy, political ideology, or religious prescription.

The constitutional right to freedom of contract was granted by the courts in place of religious values or a communitarian ethic. Enlightened secularism reduced Christian religion to its lowest common denominators as a moral code and belief in a benevolent Sovereign, which became the civil "religion of the republic."[227] Yet, court rulings and legal pronouncements never could resolve the underlying struggle between Christian evangelicals and secular humanists over the common values, goals, and purposes of American society.

The Marshall Court's grant of legal protection to incorporated private interests and charitable concerns only created the institutional structures insuring that the debate between citizens of religious and secular convictions would continue in perpetuity.[228] Severed legally from ecclesiastical structures, American citizenship now began a protracted process toward a secular, individualistic ethic that would increasingly stifle minority religious and communitarian norms. For the immediate future, under the influence of the Second Awakening and protection of the Contract Clause, Protestant theology and liberal ideology continued to share influence over the normative parameters of American citizenship.

Viewed in light of our citizenship model, the *Dartmouth College Trustees Case* illustrates the tensions that arose between minority religious participation and political rights in the early republican period. As evangelicalism swept over the young nation, her

[227]McGarvie, p. 188-189 referring to Sydney E. Mead, *The Lively Experiment: The Shaping of Christianity in America* (New York: Harper and Row 1963). *See also* Robert Bellah, *The Bellah Reader*, R. Bellah and S. Tipton, eds. (Durham, N.C.: Duke University Press 2006), pp. 230-234.
[228] McGarvie, *One Nation Under God*, p. 178-182; 190-191.

fervent converts utilized their participation in established American institutions such as Dartmouth College. Although benevolent, their religious aim was to proselytize and transform those public organizations according to the dictates of their own faith. The Liberal majority protested that such goals ran afoul of the freedoms guaranteed by the U.S. Constitution. So, the popular majority attempted to seize control through liberal legislation.

Recognizing that the Constitution forbade government interpretation of denominational doctrine and interference in affairs of faith, Chief Justice Marshall and his brethren seized upon the right to contract to resolve the matter and extricate themselves from the religious aspects of the controversy. The Justices upheld the terms of the original college charter based upon a liberal interpretation of rights as freedom from government interference. In so doing, the U.S. Supreme Court shielded the original Dartmouth trustees from the improper meddling of the liberal majority, represented by the New Hampshire Legislature. The result was the effectuation of the Church-State separation mandated by the Constitution and championed by Jefferson and Madison.

A liberal understanding of rights became the first element of citizenship firmly established in the new nation. Its' institution emanated from the religious challenge brought by the conservative, Evangelical-Protestant Trustees of Dartmouth College, who refused to cede governance of their college to the manipulations of a state legislature controlled by an ardent liberal majority. As a result, all Protestant citizens were recognized as full citizens and treated equally under the law regardless of the relative popularity of their beliefs. United as full citizens and enjoying the full array of

constitutional rights, Protestant Americans of all denominations constituted the national majority and through representational government, rose to dominance in U.S. society.

Chapter 4: The Americanization Debate:
Catholic Duty & American Patriotism (1820-1960)

Despite the institutional separation of church and state affected by the Marshall Court in the *Dartmouth College Case*, U.S. law and government continued to reflect a societal bias in favor of Protestant Christian norms.[229] The First Amendment was understood as providing religious liberty solely from the federal government, and not from state interference.[230] Good citizenship was equated with acceptance of Protestant values. Initially, this bias reflected the overwhelming majority of the American populace. However, increasing immigration from Europe after 1820 changed this demographic.

The émigrés, many of whom were Catholics, were destined to challenge the scope of religious rights and the depth of republican duty. Escaping persecution and famine, these Catholic refugees would shake ascriptive ideals of U.S. citizenship and in the process, widen American notions of religious tolerance. And, Catholic norms of building God's city on earth through earthly justice and concern for the marginalized would eventually ground republican notions of citizenship duty emphasized by the nation's Founders.

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[229] Years later, Chief Justice Marshall would write to his Episcopal priest, the Rev. J. Adams: "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 to 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." Marshall to the Reverend Mr. J Adams, Richmond, May 9, 1833 (copy in the William L. Clements Library, The University of Michigan), quoted in: Robert Kenneth Faulkner, *The Jurisprudence of John Marshall* (Princeton, N.J.: Princeton University Press 1968), pp. 139-140; Arlin M. Adams and Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (Philadelphia: University of Pennsylvania Press 1990), pp. 27-28; and Phillip E. Hammond, David W. Machacek, and Eric Michael Mazur, *Religion on Trial* (Walnut Creek, CA: AltaMira Press 2004), p. 49.

[230] *Permoli v. New Orleans*, 44 U.S. (How.) 589, 11 L. Ed. 739 (1845) and *Cummings v. State of Missouri*, 71 U.S. (Wall.) 277, 18 L. Ed. 356 (1866). In both of these cases, the U.S. Supreme Court refused to interfere with State or local measures clearly violating Catholic citizens' religious freedoms protected under the First Amendment to the U.S. Constitution. In each matter, the Supreme Court held that the guarantees of the Federal Bill of Rights were confined to the federal government and thus, did not protect the religious liberties of citizens with respect to their state governments nor impose those obligations upon state governments.

Yet, Catholic immigrant claims to American citizenship were hard fought. Their spiritual deference to the Pope was misinterpreted by their compatriots as temporal Roman allegiance and infidelity to their new country. For this reason, many natives misconstrued their faith tradition for political ideology. The result was rampant questioning of Catholic American patriotism and widespread charges of disloyalty. From 1820 to 1960, America's Catholics would struggle to overcome popular prejudice and to grasp the full rights of citizenship. To accomplish this, they would negotiate the tensions inherent between questions concerning their duty of loyalty and their claims to their membership rights. Nowhere have these tensions been more pronounced than in the struggles over public education and parochial schools. In an attempt to understand the evolving American norms of citizenship, we will explore the 1920's litigation brought by Catholics against Oregonian attempts to mandate public education. The resulting *Pierce Decision* by the U.S. Supreme Court would prove to be necessary affirmation of Catholic compliance with citizenly duty and the fulcrum shifting American perceptions toward acceptance of their constitutional rights.[231]

A. The Wave of Catholic Immigrants

Beginning in the early nineteenth century, European refugees from famine and religious persecution began to land upon American shores in growing numbers. Most of these newcomers were Roman Catholics hailing first from Ireland in the 1820's, then Germany in 1840's, and later Poland and Italy in the 1880's.[232] Each group brought their own distinct brand of culture and Catholicism, which was often in tension with existing

[231] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510; 45 S. Ct. 571; 69 L. Ed. 1070; 1925 U.S. LEXIS 589; 39 A.L.R. 468 (1925).
[232] Patrick W. Carey, *Catholics in America* (Westport, CT: Praeger 2004), p. 30.

American citizenship norms. Included in the migration were a number of liberal foreign revolutionaries and conservative Catholic priests, all escaping European repression.

As wave after wave of European refugees flooded U.S. shores, Catholic numbers in America grew proportionally from 3% to 13% percent of the total U.S. population during the period from 1820 to 1870.[233] In real numbers, this was the largest influx of immigrants that any nation had experienced to date. And, many were not only poor, uneducated, and non-English speaking, but completely unfamiliar with U.S. political institutions and Anglo-Protestant culture. Settling in unruly ghettos within the very cities that housed the nation's chief financial, manufacturing, transportation, and political centers, the foreigners threatened notions of civic homogeneity.[234] Americans were overwhelmed by the immigrant numbers and fearful of their strange influence. Faced with the large and growing throng of Catholic refugees, the Protestant majority became defensive of their own dominant position. And, indeed, Catholicism had become the largest denomination in the country by 1850.[235]

The Catholic presence challenged the implicit Protestant understanding of the First Amendment right to freedom of conscience and underlying assumptions about good citizenship. The Protestant majority viewed Catholic ritual practices as heresy and their religious deference to the Pope as treason.[236] Clearly, liberal democratic ideals of freedom of conscience and equal citizenship within the U.S. were being challenged by

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[233] Carey, *Catholics in America*, p. 30. Note that there had been Catholics in America since before the Revolutionary War. In 1789, the Pope had appointed John Carroll as their first U.S. Bishop. Based upon the difficulty in communication with the Vatican and Bishop Carroll's influence, the original U.S. Catholic population developed a unique brand of American Catholicism informed by Enlightenment philosophy and democratic in parish governance. *See* Jay P. Dolan, *In Search of an American Catholicism: A History of Religion and Culture In Tension* (Oxford: Oxford University Press 2002), pp. 23-25, 29.
[234] Rogers M. Smith, *Civic Ideals* (New Haven: Yale University Press 1997), pp. 249, 357-358.
[235] Carey, *Catholics in America*, p. 30.
[236] William R. Hutchison, *Religious Pluralism in America: The Contentious History of a Founding Ideal* (New Haven, CT: Yale University Press 2003), pp. 48-51.

mounting popular pressure to impose conformity and force "patriotic" assimilation among persons who did not fit the existing American demographic. As a result of the Revolutionary fervor over rights and their individualistic interpretation by the Marshall Court, the American majority valued the capacity for independent thought and free expression over religiously imposed orthodoxy and submission. Yet, alien Catholic ways and Roman doctrinal obedience only aggravated native fears of civic disorder and political sedition.[237]

As tensions mounted, many American politicians attempted to meld ascriptive views of a white, male, and Protestant American identity with more traditional republican ideals of civic homogeneity. They claimed that conformity fostered sensibilities of "common interest" and "love of country" that united civic brethren.[238] Nativism, a populist movement aimed at suppressing religious and ethnic differences among immigrants, rose in popularity.

Publication of nativist slander sheets\ provoked anti-Catholic violence which did not subside until after the Civil War.[239] Beginning with the 1836 publication of the Awful Disclosures of Maria Monk, a vast body of slanderous literature published stereotypes of Catholics as drunkards, Sabbath breakers, and treasonous supporters of Papal rule over American political affairs.[240] These biased images were further fomented by the anti-

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[237] Dolan, *In Search of An American Catholicism*, p. 30; John T. McGreevy, *Catholicism and American Freedom* (New York: W.W. Norton & Co. 2003), pp. 28-31.
[238] Rogers M. Smith, *Civic Ideals*, p. 84-85, 246, 296, 348-351.
[239] *See* John T. McGreevy, *Catholicism and American Freedom* (New York: W.W. Norton & Co. 2003), p. 22. Soon, Nativist literature spawned violent attacks upon Catholics, including the 1844 Philadelphia Bible Riots and Louisville's 1855 "Bloody Monday" battles. The crusade was not only verbal and militant; it was to become organized into formal political parties known as the Know Nothing Party (1854), the Ku Klux Klan (1865), and the American Protective Association (1887). *See* Carey, p. 31 *and* William P. Leahy, *Adapting to America: Catholics, Jesuits, and Higher Education in the Twentieth Century* (Washington, D.C.: Georgetown University Press 1991), p. 3.
[240] McGreevy, *Catholicism and American Freedom*, p. 22.

Papist denunciations of exiled foreign revolutionaries and the extreme conservatism of refugee European priests.[241] Nativists were joined by many of the abolitionists fighting slavery, who claimed Catholicism was supportive of the same kind of hierarchies that promoted African subjugation in the South. Unitarian Pastor Arthur Buckminster Fuller, remarked, "intemperance and slavery would quickly be overcome if [only] Romanism ceased to exert her influence to uphold them both."[242]

Nativist sentiments had not only incited violent attacks on Catholics but spawned the organization of formal political factions known as the Know Nothing Party (1854), the Ku Klux Klan (1865), and the American Protective Association (1887).[243]

In 1875, Congress attempted to pass the Blaine Amendment banning public funding of religious schools. While the Blaine Amendment failed by only 4 votes in the U.S. Senate, the majority of state legislatures amended their State Constitutions with similar provisions that remain in 37 states to this day.[244] Even to date, the U.S. Supreme Court

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[241] In the wake of the popular European revolutions of 1848, exiled European revolutionaries, such as Hungarian Louis Kossuth and Italian Alessandro Gavazzi, were invited to speak to vast American audiences. Their lectures informed American audiences that the Catholic Church was not only the enemy of freedom, but the nemesis of peace. McGreevy, pp. 23-24. During the same period from 1847-1880, Jesuit priests were expelled in numbers from the European countries of Switzerland, Italy, Spain, Germany, and France by liberal governments based upon their ultra-conservative political stance behind monarchical authority. McGreevy, p. 19. The conflicting perspectives of these exiled foreigners was soon to dramatically effect the political stance toward Catholics in the United States.

[242] Rev. Arthur B. Fuller, *Hostility of Romanism to Civil and Religious Liberty: A Discourse Delivered in the New North Church, Boston, April 3rd, 1859* (Boston: 1859), quoted in John T. McGreevy, *Catholicism and American Freedom* (New York: W.W. Norton & Co. 2003), p. 9-10 as: "On these western shores, too, in our own land, Romanism allies itself with every false and anti-republican institution which is yet tolerated in our glorious country … In intemperance and slavery would quickly be overcome if Romanism ceased to exert her influence to uphold them both."

[243] William P. Leahy, *Adapting to America: Catholics, Jesuits, and Higher Education in the Twentieth Century* (Washington, D.C.: Georgetown University Press 1991), p. 3.

[244] To this day, the U.S. Supreme Court has yet to hear a case contesting one of these state amendments, which are commonly referred to as State Blaine Amendments. While the Supreme Court has acknowledged that these state amendments were "born of bigotry" in the majority decision penned by Clarence Thomas in *Mitchell v. Helms* (2000), it has refused to render an opinion on the constitutionality of Blaine Amendments in *Locke v. Davis* (2004). Shanon S. Taylor, "Special Education, Private Schools, and Vouchers: Do All Students Get a Choice?" 34 *Journal of Law & Education* 1, 15-16 (January 2005) citing both *Mitchell v. Helms*, 530 U.S. 793, at 30-31 (2000) and *Locke v. Davis*, 540 U.S. 712 (2004). Note that Justice Clarence

has yet to hear a case contesting a state's Blaine-like Amendment.[245]Although Catholics numbered over 13% of the U.S. population by 1870, they remained a politically, socially and legally disenfranchised group due to popular prejudices against them.[246]

B. Education as Civic Flashpoint

Surrounded by hostile neighbors, Catholic immigrants became increasingly insular and placed growing reliance upon their ethnic parish churches and Catholic social services for guidance, aid, and protection against a belligerent host society. Parochial schools were one of these innovative Catholic institutions supported by clergy and laity alike since they were places where immigrants could nurture in their children their native language and own distinct culture, as well as their religion.[247] During the 1860's, these centers of learning became the major vehicle for Catholic refugees' adaptation to U.S. Society.[248]

However, the emerging Catholic schools inevitably came into conflict with the new American public school system. Recognizing education's promise, the American Protestant political elite hoped to build a public school system that would acculturate and assimilate the large immigrant population into loyal American citizens.[249] For this

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Thomas' conclusion concerning the bigotry behind the Blaine Amendments has been independently supported by at least one Jewish legal scholar: Frank S. Ravitch, "The Supreme Court's Rhetorical Hostility: What is 'Hostile' to Religion Under the Establishment Clause?," 2004 B. Y.U.L. 1031, 1045 (2004).

[245] Taylor, "Special Education, Private Schools, and Vouchers: Do All Students Get a Choice?," p. 15-16

[246] Patrick W. Cary, *Catholics in America* (Westport, CT: Praeger 2004), p. 30.

[247] Jay P. Dolan, *In Search of An American Catholicism: A History of Religion and Culture in Tension* (Oxford: Oxford University Press 2002), pp. 91, 93.

[248] McGreevy ,pp. 39-42; Dolan, pp. 60, 70.

[249] While Lutheran and Calvinist denominations hoped for a system of denominational schools funded by tax dollars, the majority of Protestant elites supported Mann's nonsectarian Christian public school. See McCluskey, p. 6. Law Professor Frank Ravitch has noted that "there is a troubling connection between public school religious exercises and pernicious discrimination against religious minorities and those who oppose such exercises." Further, he recognizes that the law is often sadly indifferent to their plight, failing

purpose, Horace Mann headed the common-school movement aiming to instill a common core of nonsectarian Christian and democratic norms. Beginning in the 1830s**,** Mann's influence spawned efforts to Americanize the immigrant youth by instilling civic values through compulsory public education.[250] Not only did these universal Christian values look remarkably similar to Mann's own Unitarian beliefs, but his common education formulas required Protestant-oriented bible readings, prayers, hymns, and instruction which violated Catholic sensibilities.[251] Mann, himself contrasted the Protestant educational approach promoting "freedom of opinion for each, and tolerance for all" with Catholic doctrine which allegedly avowed that "men could not think for themselves," "opposes everything which favors democracy and the natural rights of man," and "hates our free churches, free press, and above all, our free schools."[252] Thus, the nation's schools became the flashpoint for Nativist-Catholic struggle to define the values of American citizenship.[253]

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to address the underlying social dynamics behind the discrimination and focusing instead on the constitutional issues raised by litigants. *See* Frank S. Ravitch, "A Crack in the Wall: Pluralism, Prayer, and Pain in the Public Schools*," Law and Religion: A Critical Anthology*, Stephen M. Feldman, ed. (New York: New York University Press 2000), p. 297.

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[251] Neil G. McCluskey, S.J., *Catholic Education in America: A Documentary History* (New York: Teachers College of Columbia University 1964), p. 6; Frank S. Ravitch, "A Crack in the Wall: Pluralism, Prayer, and Pain in the Public Schools," *Law and Religion: A Critical Anthology*, Stephen Feldman, ed. (New York: New York University Press 2000), p. 298. Note that the dominant values of the new common schools were Americanism, Protestantism, and capitalism also reflected the central U.S. middle class cultural norms. *See* Warren A. Nord, *Religion & American Education: Rethinking a National Dilemma* (Chapel Hill: The University of North Carolina Press 1995), p. 75.

[252] Horace Mann quoted in McGreevy, p. 39.

[253]Constitutional scholar Douglas Laycock indicates that the motivation for outlawing sectarian schools was "not pretty. It traces not to any careful deliberation about constitutional principles of the proper relations of church and state. Rather it traces to vigorous nineteenth century anti-Catholicism and the nativist reaction to Catholic immigration. The fact is that no one in America worried about religious instruction in schools before Catholic immigration threatened Protestant hegemony. Douglas Laycock, "Summary and Synthesis: The Crisis in Religious Liberty," *George Washington Law Review* 60 (March 1992) 841-856, p. 845 *cited in* Warren A. Nord, *Religion & American Education: Rethinking a National Dilemma* (Chapel Hill: The University of North Carolina Press 1995), p. 73**.** [For histories of American education that examine these religious disputes, see Charles L. Glenn, *The Myth of the Common School* (Amherst : University of Massachusetts Press **1**988); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American*

There was even disagreement among American Catholics themselves over the existence of a separate, Catholic school system. Bishop John Hughes of New York briefly organized political support for public assistance to parochial schools, but when his effort failed to persuade lawmakers, intrareligious conflicts flared between Catholic factions.[254] While immigrant and traditional Catholics resisted the public schools, more liberal US-born Catholics such as Archbishop John Ireland and Orestes Brownson urged accommodation with the public school system in hopes of fostering American assimilation.[255] They were opposed by conservative clergy, led by Bishop Bernard McQuaid, who rejected the public schools as "Godless."[256] Internal Catholic debate was soon augmented by the parochial school building spree triggered by the Third Plenary Council of Baltimore (1884), which formally directed every pastor to construct a parish school and Catholic parents to patronize it.[257] Through their building campaign, traditionalist Catholics made clear that they would not voluntarily permit their children's assimilation into a pan-Protestant definition of American citizenship at the cost of their own religious traditions.

In the end, the separatist Catholic approach won the sanction of Pope Leo XIII. His encyclical *Longinqua Oceani* (1895) and subsequent letter, *Testem Benevolentiae* (1899) condemned "Americanism," thereby ending any attempt to adapt Catholicism to U.S.

Society 1780-1860 (New York : Hill and Wang 1983); Diane Ravitch, *The Great School Wars* (New York: Basic Books 1974). For more general treatments of anti-Catholicism, *see* David H. Bennett, *The Party of Fear: From Nativist Movements to the New Right in American History* (New York : Vintage Books 1995); Michael Schwartz, *The Persistent Prejudice: Anti-Catholicism in America* (Huntington, Ind. : Our Sunday Visitor 1984). For a brief summary of nineteenth-century disputes over religion in education, drawn from these and similar sources, see Douglas Laycock, "*Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37 (1991).]

[254] McGreevy, pp. 39-40.

[255] McGreevy, pp. 45-47, 120-122. Dolan, pp. 65, 101.

[256] Quoted in Dolan, *In Search of An American Catholicism*, p. 105. *See also* McGreevy, pp. 46-47.

[257] James Michael Lee, "Catholic Education in the United States," *Catholic Education in the Western World*,
James Michael Lee, ed. (Notre Dame, IN: University of Notre Dame Press 1967), p. 256.

culture and the separation of Church and State. While the debate lingered among Catholic scholars and modernist theologians, Pope Leo's successor, Pope Pius X, attempted to forestall further discussion by issuing his encyclical, *Pascendi Dominici Gregis* (1907), detailing and prescribing remedies designed to end any further efforts to modernize Catholic theology. The immediate result was that American Catholics intellectually separated from modern U.S. culture and focused their energies on social programs, as well as strengthening Catholic Church institutions.[258]

The Catholic school became the center of the urban national parish. Motivating school attendance were dire clerical warnings that without Catholic school training, children were in danger of losing the faith. Further, non-English speaking European immigrants relied upon these parish schools to instruct their children in their native languages and ethnic culture as well as their Catholic faith. They fiercely resisted the common school system. Such resistance only served to escalate the animosity and hostility of their American-born neighbors. To many natives, it appeared that Catholics were taking their directions from Rome rather than Washington, banning together in close-knit ghetto communities, and favoring sectarian religious instruction over secular civic education.

The conflict over parochial schools would help define the interaction between American citizenship and religious freedom within U.S. culture. Would there be religious freedom for all or only preferential liberty for Protestant believers? Could devout Catholics meet their civic duty to be loyal American citizens or did they require educational indoctrination? And, would American society accept persons holding unpopular religious beliefs as patriotic members or limit full citizenship to the Protestant majority? These were the questions which would continue to be debated until the popular

[258] Dolan, pp. 107-108, 115, 117. Leahy, p. 9-10.

election of President John F. Kennedy resolved public fears about Catholics. In the meantime, the very existence of parochial schools was to come under threat. It would take a determined group of religious sisters to appeal for U.S. Supreme Court determination regarding the fate of the American Catholic School System.

With the commencement of W.W. I, nationalism and nativism reached extreme levels. War with Germany heightened concerns about domestic political loyalty. The first year of the war saw the revival of the Ku Klux Klan, an Anglo-Protestant supremacy group. The anti-Catholic, anti-immigrant fervor continued to crest through the War's end and the 1920's, with Catholics identified as roadblocks to both prohibition and restoration of Protestant middle-class culture. Increasingly, education became the fulminating issue as both parochial and public school enrollment rose to unprecedented levels.[259] The mood culminated with the 1924 Johnson-Reed Act restricting immigration and the 1928 defeat of Irish Catholic Presidential Candidate Al Smith.[260] In the midst of these events, the State of Oregon would attempt to eliminate parochial schools altogether.

C. Oregonians Legislate Mandatory Public School Attendance

Nowhere in the nation was the clamor against Catholics and other immigrant minorities as pronounced as in Oregon. A state with one of the most homogenous and literate populations in the country, Oregonians venerated a self-constructed myth of

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[259] The enrollment in Catholic schools had risen 400% from 1880-1920, from just over 400,000 to 1,701,219 students. *See* Thomas C. Hunt, Ellis A. Joseph & Ronald J. Nuzzi, eds. *Catholic Schools in the United States: An Encyclopedia*, Vol. 1 (Westport, CT: Greenwood Press 2004), p. 2.During the same period, the student body of public schools was also growing rapidly from 1 million in 1880 to 21 million in 1920. The growing number of Catholic schools ignited efforts by the Masons and the KKK to require attendance at the public schools. *See* McCluskey, p. 25.

[260] Dolan, *In Search of An American Catholicism*, p. 123, 132-135; Leahy, p. 3. The Johnson-Reed Act is official known as the Immigration Act of 1924, 68 Cong. Ch. 190, 11(a), 43 Stat. 153, 159 (1924) (repealed 1952).

themselves as heirs to the Oregon Trail Pioneer. This idealized "American" was the independent white, Anglo-Saxon Protestants from New England and the Mississippi Valley who originally traversed the mountains in "covered wagons" to civilize the West. Other groups, particularly Catholics, were perceived as a threat to this American identity.[261] Thus, Oregonians eagerly rallied around the nativist legislation first advanced by the Scottish Rite Masonic Order in 1920 with the support of the Ku Klux Klan.

While the Klan had only arrived from California in early 1921, membership rapidly grew to 14,000 by the spring of 1922, with many more expressing support for their principles.[262] Like other Nativists of the time, the Klan managed to fuse regard for traditional republican duties of national loyalty and patriotism with a popular, ascriptive model of the "Americanism" (the "Oregonian pioneer"). Their concept of civic membership was born of the most divisive ideals of communitarianism and identity politics. Originally drawing most of its numbers from semi-rural areas, the Klan successfully leveraged its political power in Portland and her environs by establishing the Good Government League, a combination of patriotic societies and lodges.

When in 1922 the Scottish Rite Masons circulated a ballot proposal favoring free, compulsory public elementary schools, the Klan championed the initiative. Both groups insisted that only compulsory public education could instill the republican virtues of national loyalty and patriotism in all children, particularly Catholics. Under the banner of God and country, both Masons and Klansmen toured the state attacking the evils of private academies, focusing most of their rhetoric upon the distinct dangers posed by

[261] Holsinger, p. 328-329.
[262] David M. Chalmers, *Hooded Americanism: The First Century of the Ku Klux Klan, 1865-1965* (Garden City, N.Y. 1965), p. 88 *cited in* Holsinger, p. 329.

tyrannical Catholic education.[263] Their vehement opposition to Catholic schools is best understood in light of the fact that parochial schools enrolled over half of the students attending Oregon's private academies.[264] Speakers insisted that all Catholics were guilty of treason and engaged in immediate preparations to overthrow the U.S. government in favor of the Pope. They asserted that every true Americans could see that parochial schools constituted the training ground for treason and corruption.

While the Klan railed against "Koons, Kikes, and Katholics,"[265] the Masons made veiled appeals to voters' anti-Catholic bias as well as self-preservationist fears:

> "We must halt those coming to our country from establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government."[266]

The express motive for the Oregon mandatory education bill was to inculcate the duty of patriotism and loyalty in all students, but the underlying intent was clearly forced assimilation of Catholics through compulsory public school indoctrination. Attacking "cliques, cults, and factions," the Oregon school bill supporters rallied behind the slogan of "Free Public Schools – Open to All, Good Enough for All, Attended by All. All for the Public School and the Public School for All. One Flag, One School, One Language."[267]

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[263] Holsinger, pp. 330-332.

[264] Oregon private schools enrolled 12,031 students in 1922. Included in that number were grade school children of whom 7,303 were taught by Roman Catholic schools, 750 by Adventists institutions, and 450 by Lutheran academies. W.L. Brewster in *Oregon Voter,* XXIX (September 16, 1922), p. 16. *See* M. Paul Holsinger, "the Oregon School Bill Controversy: 1922-1925," *The Pacific Historical Review,* Vol. 32, No. 3 (Aug. 1968), pp. 327-341, at p. 330, ftn. 14.

[265] Elinor Langer, *A Hundred Little Hitlers* (New York: Metropolitan Books 2003), p. 211 cited by Cheryl A. Brooks, "Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment," 83 *Oregon Law Review* 731 (2004), 748 ftn. 89.

[266] Masonic Program, quoted in *Oregon Voter* XXIX (July 22, 1922), p. 7 referenced in Holsinger, "The Oregon School bill Controversy,", p. 332, ftn. 19.

[267] Only the English language was to be taught in elementary schools. P.S. Malcolm, Inspector-General of the Scottish Rite in Oregon originated this slogan, as quoted in Covallis, *Gazette-Times* (Oct. 30, 1922), p. 3 and cited by Holsinger, p. 332, ftn. 21.

Campaigning for renewal of his term, Republican Governor Olcott took the high road, refusing to support the compulsory education bill or any other Klan efforts. However, his underdog Democratic opponent, State Senator Walter M. Pierce, saw in the frenzy over protection of Americanism and the cutting of taxes a sure recipe for victory. Insisting that he was "a Protestant, the ninth generation in America" and "shall vote for the compulsory school bill sponsored by the Scottish Rite Masonic bodies of Oregon," Pierce engendered Klan support.[268] Record numbers of Oregon citizens voted in the state elections held November 7, 1922, resulting in the overwhelming election of Klan-supported Walter Pierce for Governor, a sweep of nativist candidates into the state legislature, and the passage of the mandatory school bill by more than 11,000 votes. In the aftermath, the *Oregon Voter* insisted that the compulsory school board supporters were "possessed by the obsession that their principal duty as citizens [was] to destroy Catholic schools."[269]

The bill's mandatory public education requirement did not go into effect until September, 1926. While numerous Oregonian and national newspapers lamented the illiberal decision of the state's voters, the Klan-dominated legislature moved swiftly to implement their "100% American" program.[270] Acts were passed directing that the U.S. Constitution be taught in all schools, textbooks stress the governmental accomplishments of America's Founders, and any teacher who wore religious dress be subjected to suspension or expulsion. Undeniably, the teachers' attire law was intended to eliminate the Catholic nuns that many school districts had hired to meet a shortage of qualified teachers.

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[268] Quoted in (Portland) *Oregonian* (Sept. 13, 1922), p. 11 and cited by Holsinger, p. 334-335, ftn. 31.
[269] *Oregon Voter*, XXXI (November 11, 1922), p. 6 quoted by Holsinger, p. 337.
[270] Holsinger, pp. 336-338. *See* Cheryl A. Brooks, "Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment," 83 *Oregon Law Review* 731 **(**Winter 2004**)**, at p. 748.

D. *Pierce v. Society of Sisters* (1925)

Opponents of the compulsory education bill reacted. The national Supreme Council of the Knights of Columbus voted to finance a constitutional challenge. Other religious and non-sectarian groups were determined to contest in federal court the constitutionality of the new law before its effective date. And so, the Society of Sisters of the Holy Name of Jesus and Mary along with the Hill Military Academy filed suit against Oregon's Governor Pierce early in 1923. A three judge panel of the U.S. District Court in Portland heard the cases jointly and ruled against the State of Oregon on March 31, 1924. Publishing their decision, Judge Charles E. Wolverton announced that the legislature of the State of Oregon had exceeded its authority by both depriving the subject schools of "their constitutional right and privilege to teach in grammar schools" and "their property" without legal due process.[271] Most prominent American newspapers and national observers applauded the federal court's decision overruling the majoritarian attempt to subvert religious liberty for the sake of subjecting others to their own narrow definition of patriotic duty. Praising the U.S. District Court's ruling, the Norfolk paper, *Virginian-Pilot*, insisted that:

> "Oregon [will] be once more safe for the kind of Americanism that flourished … prior to the propagation of the doctrine that in the name of Americanism it is proper to annihilate individual religious and educational preferences."[272]

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[271] *Society of Sisters of the Holy Names of Jesus and Mary v. Pierce, Governor of Oregon, et. al.; Hill Military Academy v. Same*, 296 F. 928 (D. Or. 1924) at 938.
[272] Quoted in *Literary Digest*, LXXXV (April 26, 1924). *See* Holsinger, p. 338, ftn. 43.

Still, the *Oregon Voter* warned against overconfidence in the lower court victory, insisting that "Anti-Catholic prejudice, anti-alien prejudice, and anti-snob prejudice was neither reduced nor wiped out by the decision."[273]

Governor Pierce immediately announced that the State of Oregon would appeal the District Court's decision to the U.S. Supreme Court. He chose former U.S. Senator George Chamberlain to handle Oregon's case before the U.S. Supreme Court. Predictably, Chamberlain's initial brief denied that the State's compulsory education act adversely affected the liberty or property interests of the Appellees. It emphasized the laudable aim of instilling citizenship duties. Resting his argument for the State of Oregon upon the will of her voters, Chamberlain insisted that the people intended for the statute to prevent the religious distrust created by sectarian schooling. Instead, they sought to inculcate common duties of citizenship through compulsory public elementary education.[274] Deeming public schooling necessary to Americanize new immigrants into "patriotic and law-abiding citizens," Senator Chamberlain emphasized the state school authorities' full discretion and exclusive control over universal public school attendance as well as the common curriculum. In fact, he asserted that if the Oregon Compulsory School Law was held unconstitutional,

> "within a few years the great centres [*sic*] of population in our country will be dotted with elementary schools which instead of being red on the outside will be red on the inside. Can it be contended that there is no way in which a state can prevent the entire education of a considerable portion of its future citizens being

[273] Oregon *Voter*, XXXVII (April 5, 1924), P. 5 quoted by Holsinger, p. 338.
[274] George E. Chamberlain, Esq., "Brief of Appellant, The Governor of the State of Oregon," p. 40 reprinted in *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional* Law, P.B. Kurland & G. Casper, eds., Vol. 23 (Arlington, VA: University Publications of America, Inc. 1975), p. 47.

controlled and conducted by bolshevists, syndicalists and communists?" [275]

In his Conclusion, the Senator followed his warning of communist schooling with a subtle attempted to play upon popular anti-Catholic prejudices. Claiming potential injury to children's American patriotism may result in the absence of state government limits upon parental education choices, he stated:

> "children may be taught that their true allegiance is to some country other than the United States" [and] "that the claims upon them of the religion to which they belong are superior to the claims of the United States."[276]

Defense of the Oregon Statute clearly rested upon a concern over citizenship duties of patriotism and loyalty born from a fear of difference and an attempt to impose order through conformity. The Appellants asserted that the federal courts must defer to the right of the State and the determination of her voters on how to "Americanize its new immigrants." [277] At that time, it was inconceivable that the Fourteenth Amendment could affect the privileges and immunities of state citizens with regard to schooling. Education had long been assumed to be within the exclusive police powers of the state and thus, a question of state, rather than federal, law.[278]

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[275] Ibid., p. 53.
[276] Ibid., p. 69.
[277] Ibid., p. 52 and Oregon Attorney-General Isaac H. Van Winkle, "Brief of Appellant," *Landmark Briefs and Arguments*, supra. ftn. 40, pp. 99, 163.

[278] The Fourteenth Amendment to the U.S. Constitution was passed by Congress after the Civil War in an effort to protect the rights of emancipated slaves against Southern state governments. Ratified on July 9, 1868, the portion of the amendment utilized by Guthrie and relevant to our discussion is Art. I, sec. 2 which affords due process and equal protection of law:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

Aware of the quiet subtext of Oregon's Appellant Brief, the Society of Sisters' Attorney William Guthrie underscored individual rights of conscience and property ownership while simultaneously exposing the "oblique innuendoes" against Catholic schools. Guthrie insisted that the Oregon Compulsory School Bill abridged the liberties of four interrelated classes: private and parochial schools, teachers, parents/guardians, and children. While the statute usurped the nonpublic schools' property rights in their business and infrastructure granted by their Oregon corporate charter, it also impinged upon the profession of private teachers. At the same time, the right of parents, guardians, and children to choose between private and public education was undermined by the state mandate that all children attend public schools. This was not a legitimate exercise of state police power, Guthrie argued. Rather, it was an arbitrary, unreasonable and ruthless invasion of individual rights.[279]

Only the Fourteenth Amendment invoked within the context of equitable jurisdiction, could relieve the infringement of such constitutional rights, privileges or immunities from state violation or infringement.[280] Private schools did not interfere with state conduct of

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any person within its jurisdiction the equal protection of the laws.
. U.S. CONST. amend. XIV, sec. 2 (1868).

Chamberlain, supra. ftn. 40, pp. 25-33. At that time, it was believed that the *Slaughter House Case*, 83 U.S. 36; 21 L. Ed. 394; 1872 U.S. LEXIS 1139; 16 Wall. 36 (1873) had settled that fact that the Fourteenth Amendment only applied only to assure citizens of the United States of the minimum protection of the Federal Constitution. It was presumed that the Fourteenth Amendment did not extend additional protections to citizens of the various states nor interfere with the power of the state governments over their citizens' rights. *See* Chamberlain, pp. 25-33 and Van Winkle, pp. 86, 98.

[279] William D. Guthrie, "Brief on Behalf of Appellee, *Landmark Briefs and Arguments*, reprinted in *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional* Law, P.B. Kurland & G. Casper, eds., Vol. 23 (Arlington, VA: University Publications of America, Inc. 1975), pp. 165-257; as to 14th Amendment pp. 209-213, 234-235, 240.

[280] Guthrie, "Brief on Behalf of Appellee, pp. 165-257; as to 14th Amendment pp. 206-207, 240; regarding state police powers p. 209; concerning abridgment of the rights of four interrelated classes p. 213. Note that Guthrie was making a novel argument since the Supreme Court had not yet begun to apply the "incorporation doctrine" to enforce Bill of Rights protections for national citizens against state governments. *See* Chap. 1, p. 24, ftn. 51 of this dissertation. *See also* James Hitchcock, *The Supreme Court*

public schools nor dispute the state's right to reasonable regulation. Rather, the Governor wanted to eliminate all religious education or to allow state law, dictated by majority vote, to prescribe the one religion in which students would be trained. Guthrie warned the Court that if the Oregon Act was held constitutional, then "any dominant political group could monopolize all education … and could to a very large degree in practical effect control public opinion on religious and social issues."[281] The State's statutory attempt to monopolize elementary education constituted a tyranny of the majority over the inalienable rights of the Appellees.

Meeting the Oregon Governor's contentions concerning patriotism head-on, Guthrie asserted that all Catholic schools taught patriotism and the two bases of good citizenship, namely legal obedience and religious tolerance. Further, private and religious schools taught the same subjects as the public schools, including citizenship, under the supervision of the State Superintendent of Public Instruction. [282] He charged that under the appealed statute, Oregon "assumes an arbitrary power to discriminate as it pleases in deciding what children shall be taught … and by whom.'[283] Suppression of private elementary schools not only denied citizens of individual freedom of choice as to type of education, but also prevented them from enjoying the opportunities of self-advancement, self-development, and inalienable liberty.[284]

Underscoring the theme of individual rights, Guthrie asserted that:

> "Catholics never forget that they owe the blessing of the religious liberty which

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and Religion In America, Vol. 1 (Princeton: Princeton University Press 2004), pp. 153-155 and ftn. 84 below.

[281] Guthrie, "Brief on Behalf of Appellee," p. 254.

[282] Guthrie, p. 190. 230.

[283] Guthrie, p. 253.

[284] Guthrie, pp. 252-253.

> they now enjoy and which the National Constitution guarantees to a generation that was overwhelmingly Protestant."[285]

The liberty to contract, to teach, and to choose your child's course of education were all individual rights protected from state interference by the Federal Constitution. Citing Justice McReynold's opinion in *Meyer v. Nebraska* back to him, Guthrie asserted:

> "The desire of the legislature to foster a homogenous people with American ideals prepared readily to understand current discussions of civic matters, is easy to appreciate … But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefore in time of peace and domestic tranquility has been shown."[286]

Amicus briefs were filed by the American Jewish Committee, the North Pacific Union Conference of Seventh Day Adventists, and the Domestic and Foreign Mission Society of the Protestant Episcopal Church. While the Adventists' brief concentrated on the inalienable character of natural rights which necessarily outweighing the state's police powers, the Protestant Episcopal Church paper emphasized religious education as a necessary basis for developing good citizens and an essential foundation for popular government. The American Jewish Committee contributed an in-depth analysis of the Nativist Pamphlet originally used in support of the Oregon Compulsory School Bill. Disputing its numerous assertions in support of mandatory public education, the Jewish report insisted that the bill's protagonists "sit in judgment upon their fellow-citizens"

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[285] Guthrie, p. 192. Note that Guthrie's statement also implied Catholic deference to the norms and ideals of the American Protestant majority.

[286] Guthrie, p. 222 citing *Meyers v. Nebraska*, 262 U.S. 390; 43 S. Ct. 625; 67 L. Ed. 1042; 1923 U.S. LEXIS 2655; 29 A.L.R. 1446 (1923).

seeking "not for the good of the whole but for the supremacy of themselves." The Oregon statute demonstrated "the evils of intolerance," "undermin[ing] the fundamental concepts of liberty," and "carrying us back to those evil days which preceded the adoption of our American Constitution."[287]

When commenced on March 16th of 1925, oral arguments focused upon whether the State could require a child to attend public schools. On behalf of Oregon, Assistant Attorney General Willis S. Moore contended that due deference should be extended by the Court to Oregon's voters - who had been determined to promote their common welfare through enactment of the compulsory education bill.[288] Not, of course, admitting the bigotry motivating the Act, his oral argument emphasized the majority will and the State's interest in educating its children. Upon questioning by Chief Justice McReynolds, Moore did acknowledge that the act would close every parochial and private school in the state.[289] Further, he conceded that the people could not violate citizens' Constitutional rights even when enacting an education bill consistent with the state's police power.[290]

Responding for the Society of Sisters, Attorney Guthrie identified "the true and real motive and intent of this measure" as:

> "an attempt to deny religious liberty or freedom of conscience to those parents who desire to send their children to schools of their selection, where the doctrines of their own faith – be it Catholic, Protestant, or Jewish- can be taught them, the enactment would likewise constitute a violation of religious liberty, which is also

[287] William A. Williams, "Brief of Wm. A. Williams As Amicus Curiae," pp. 427, 429, 433, and 438; Davies, Auerbach & Cornell, "Brief Amici Curiae on Behalf of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church," p. 412-413; Louis Marshall, "Brief for American Jewish Committee," p. 402 all contained in P.B. Kurland & G. Casper, *Landmark Briefs and Arguments* (1975), supra. ftn. 40.
[288] Moore, "Oral Argument," p. 458-459,, 461, 463
[289] Moore, "Oral Argument," p. 462.
[290] Moore, "Oral Argument," p. 465.

> guaranteed by the Fourteenth Amendment against undue denial by a state; but this point has not yet been expressly decided by this Court… ."[291]

He then asserted claims in equity for the deprivation of the Society of Sisters' liberty and property rights under the vestiges of an improper law. The Compulsory Public School Act not only destroyed the patronage of the Sister's academies by forbidding parents to send their children to its elementary school, but prevented its primary school teachers from pursuing their profession. In turn, this undermined the Society's state chartered right to conduct private schools. Thus, the Society of Sisters was entitled to protection under the Fourteenth Amendment, as were the liberty interests of the parents as well as both the liberty and property rights of the teachers.[292] Arguing that religious schools had operated without interference in the U.S. for almost three centuries, Guthrie concluded that the Oregon statute was not a "compulsory education law" but rather a "compulsory public education law, requiring children to attend a public school under penalties of fine or imprisonment against the parents." Upholding such an act "would suppress and destroy all private schools."[293]

On June 1, 1925, the Supreme Court published its unanimous decision in favor of the Society of Sisters and the Hill Military Academy. [294] Justice McReynolds, writing for the

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[291]Guthrie, "Oral Argument," p. 470

[292] Guthrie, "Oral Argument," pp. 468-469. *See also,* Guthrie, "Brief on Behalf of Appellee," pp. 181-183, 256.

[293] Guthrie, "Oral Argument," p. 470.

[294] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).*See* James Hitchcock, *The Supreme Court and Religion In America*, Vol. 1 (Princeton: Princeton University Press 2004), pp. 153-155 who states that in *Meyers* (1923) and *Pierce* (1925), the Supreme Court seemed to apply substantive due process to personal liberties for the first time. However, he admits that the basis for the decisions remains ambiguous. However, he presents as evidence for his theory Justice Stone's citation both *Meyers* and *Pierce* in his *Caroline Case Opinion* (1937) in a footnote, treating the cases as precedents for use of the Fourteenth Amendment to incorporate Bill of Rights protections.

Court, stated that "the child is not the mere creature of the state."[295] While the State unquestioningly had the power to reasonably regulate the schools and to ensure that studies essential to good citizenship were taught by patriotic teachers,

> "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[296]

Rather, the parents and guardians had the right and duty to direct their children's education. The Oregon Compulsory Education Act of 1922 arbitrarily and unreasonably violated these fundamental rights of parents and thereby, jeopardized the patronage supporting the business and property interests of both private teachers and schools. The Fourteenth Amendment protected the Appellees against such interference by the State. And since Appellees' injury was "present and very real," the Court ruled the suit ripe for equitable relief.[297]

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[295] *Pierce*, 510 U.S. at 535, 45 S. Ct. at 573. While McReynolds' views of Catholicism are not recorded, he was often referred to as "the most bigoted person ever to sit on the Court" because of his expressed racism and anti-Semitism. In fact, the attorney who represented the Appellant in Meyer v. Nebraska (1923) observed the *Pierce* oral arguments and commented that his personal impression was that McReynolds was influenced by his distaste for suggestion that the State might require all children to attend public school. James Hutchinson, *The Supreme Court and Religion in American Life* , Vol. II (Princeton, NJ: Princeton University Press 2004), p. 88. *See also* William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927* (Lincoln, NB: University of Nebraska 1994), p. 190-193**.** This observation squares with observations of a McReynolds biographer who notes the Justice's decision in the *Pierce Case* reflected his father's opposition to free public schools based upon his belief in self-reliance and insistence that public authorities could not legitimately usurp a person's responsibility for the education of his children. James E. Bond, *I Dissent: The Legacy of Chief Justice James Clark McReynolds* (Fairfax, VA: George Mason University Press 1992), p. 4, 73.

[296] *Pierce*, 510 U.S. at 535, 45 S. Ct. at 573.

[297] *Pierce*, 510 U.S. at 535-536, 45 S. Ct. at 573-574. Note that the U.S. Supreme Court decision indicated that nothing in the record indicated that the Society of Sisters had failed to meet the terms of their 44 year old corporate charter to provide temporal courses as well as "systematic religious instruction and moral training according to the tenets of the Roman Catholic Church." What is more, State of Oregon had long allowed the Sisters to offer education and instruction to youth, offering classes which contemplated continuing study under the Sister's tutelage. The Court implies that absent a special emergencies or extraordinary circumstances, the State was now estopped from challenging the Sisters' educational abilities.

Most important was the element not mentioned in the Court's unanimous decision. Despite derogatory references in Oregon's briefs and implications in oral argument, the Supreme Court decision made no reference to the Catholic religion other than to note that the Sisters had met the educational terms of their 1880 Oregon corporate charter.[298] By suddenly causing student withdrawals, the Oregon Compulsory Education Act had not only directly impaired the Sisters' school and income but also their students' education. Resting its decision upon the recent precedent of *Meyer v. Nebraska* (overturning a state statute unreasonably restricting German language instruction), the Court expressly grounded its holding upon the fundamental liberty of parents to chose their child's course of education.[299] In doing so, the U.S. Supreme Court guaranteed the right to operate private, religious schools. For this reason, at least one authority has identified the *Pierce Case* as "the Magna Carta of parochial schools."[300] Thus, the Justices unanimously supported the parallel existence of private/ parochial academies and public schools.[301] By implication, the Supreme Court acknowledged that patriots not only directed both kinds of schools, but both systems of education could transform students into staunch American citizens.

While the Supreme Court's decision emphasized the rights of individual citizens, it did little to address Oregon's concerns about inculcating citizenly duties and assimilating foreigners. Despite the Appellants' insistence that concern over patriotism was the basis for the Oregon Compulsory Public School Act, the Court did not deem it important to

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[298] *Pierce*, 510 U.S. at 532, 45 S. Ct. at 572.
[299] *Pierce*, 510 U.S. at 534, 45 S. Ct. at 573. *Meyers v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1146 (1923).
[300] Robert T. Miller and Ronald B. Flowers, *Toward Benevolent Neutrality: Church, State, and the Supreme Court* (Waco, TX: Markham Press Fund of Baylor University Press 1996), p. 412.
[301] Hitchcock, *The Supreme Court and Religion in American Life* , Vol. II, pp. 88-89

inquire into parochial schools' and teachers' national loyalty or performance of their citizenly duties. Instead, the Court indicated that the lower court had determined that "the Appellees' schools were not unfit or harmful to the public."[302] While indicating that the state had certain authority to require teachers to be of "patriotic disposition" and students to study "good citizenship," the Justices found that there were "no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education."[303] True, in the past, McReynolds had expressed some sympathy for the State's concern about creating a homogenous citizenry. Even if he found no legitimate relationship between a State's prohibition of German language instruction and its aim to curb sedition, he specifically stated in his prior opinion of *Meyers v. Nebraska*:

> "The desire of the legislature to foster a homogenous people with American ideals prepared readily to understand current discussion of civic matter is easy to appreciate."[304]

For McReynolds and the other Supreme Court justices, Constitutional protections of unalienable rights to individual choice and to property ownership clearly took precedence over Oregonian legislative attempts to publicly educate Catholic school children into compliance with local notions of patriotism. What is more, Catholics themselves had acknowledged and affirmed the American Constitutional gift of individual religious liberty in both their advocate's Appellee Brief and Oral Argument.[305]

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[302] *Pierce*, 510 U.S. at 534, 45 S. Ct. at 573.
[303] *Pierce*, 510 U.S. at 534, 45 S. Ct. at 573.
[304] *Meyers v. Nebraska*, 262 U.S. 390, at 402, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1146 (1923). *See* Bond, *I Dissent*, p. 73.
[305] Guthrie, "Appellee Brief," p. 192 and "Oral Argument," p. 489-490 all contained in P.B. Kurland & G. Casper, *Landmark Briefs and Arguments* (1975), *supra.* ftn. 40. *See supra* footnote 54, p. 11.

Through the *Pierce* decision, the United States Supreme Court demonstrated that the federal judiciary prized the Constitutional protection of every American citizen's individual rights above unreasonable attempts of state legislatures to impose patriotism and loyalty through educational means. By elevating citizens' constitutional rights over dutiful conformity, the Court signaled that it would not condone the totalism of majority politics nor allow prejudicial legislation to deprive religious minorities of their Constitutional liberties.[306] Although not decided under the First Amendment, *Pierce v. Society of Sisters*[307] was recognized as an acknowledgement of more than just parental choice in education. Catholics and non-Catholics alike understood this decision to be a clear affirmation of the existence of parochial schools.

E. Citizen Education After the *Pierce Decision*

While it is important to emphasize that the *Pierce Case* was decided under the Fourteenth Amendment due process grounds and not upon First Amendment religious liberty, the Court's ruling informed Americans that Catholic schools would remain an optional, private education system operating alongside the free public schools. The Supreme Court had approved a parallel system of free public schools and paid private schools which gave parents, rather than the State, the power to choose who would train

[306] Describing U.S. culture, Martin Marty contrasts "totalists" who persistently attempted to impose a common definition of American citizenship norms with "tribalists" who preferred their own isolated group's standards. In the same book, he earlier explains the common school movement as an attempt of a democratic nation to use education as the "builder of a cultural sameness" during a time of mounting Catholic immigration. Marty insists that the U.S. attempted to use education as the tool in its "searching for sameness without choosing to use a central authority to impose it." Martin E. Marty, *The One and the Many: America's Struggle for the Common Good* (Cambridge, MA: Harvard University Press 1997), p. 62 and pp. 51-53, 55.

[307] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510; 45 S. Ct. 571; 69 L. Ed. 1070; 1925 U.S. LEXIS 589; 39 A.L.R. 468 (1925).

their children. Still, education would remain an area of legal and civic contention in the United States for years to come.

America's continuing conflict between public and parochial education was embedded in its ambiguous, two-stream heritage. As Robert Bellah has identified, the Founders had bequeathed to the nation two competing traditions, republican citizenship and liberal democracy.[308] Based upon the republican understanding, America's government officials and state constitutions regularly emphasized public education as the preferred means of imbue the new generation with a sense of their duties as citizens. Republican forms of government were understood to require a civic commonality and a shared discourse among its citizens which could only result from a set of shared beliefs.[309] Through the perspective of liberal democracy, the U.S. Constitution protected individual citizens' religious liberties and the right to send their children to parochial schools. The purpose of the government was to prevent abridgement of personal freedoms, not to interfere with citizens' lives. Although protecting Catholic parents' inalienable rights to educational choice, the Supreme Court's *Pierce Decision* emphasized that the states' duty to protect the security, health, and welfare of its citizens. The Court's opinion asserted the states' unquestioned authority over educational standards. This power encompassed oversight of civic education requirements as well as teacher qualifications of scholarly competence and national loyalty.

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[308] Robert N. Bellah, "Religion and the Legitimation of the American Republic," *The Robert Bellah Reader*, Robert N. Bellah and Stephen M. Tipton, eds. (Durham, N.C.: Duke University Press 2006), p251. ***See** also* Roberts M. Smith, *Civic Ideals*, pp. 36-38.

[309] Martin E. Marty, *The One and the Many*, pp. 50-51, ftn. 5. Note that many civic republicans, like nineteenth century Educator Horace Mann, believed that the promotion of sameness was important to the furthering of national unity. To this end, Mann concentrated on using the free public school to indoctrinate immigrants into a homogenized, "American" set of beliefs and way of life.

Like the *Dartmouth College Decision*, the Court's *Pierce* holding also failed to directly acknowledge First Amendment freedom of religion. Yet, it did further extend the concept of republican citizenship toward what Rogers M. Smith would deem a more "democratic moment."[310] It did much to marry popular republican citizenship virtues of personal patriotism and national loyalty with democratic values of religious tolerance and individual liberty. Just as the Court's rulings to uphold the Thirteenth, Fourteenth, and Fifteenth Amendments served to include more persons under the rubric of "full citizenship," the *Pierce Case* did much to welcome Catholics into the American fold.

For U.S. Catholics, the *Pierce* ruling immediately signaled religious acceptance by the highest gatekeeper of American culture. For them, the U.S. Supreme Court decision offered acknowledgment of their national loyalty, acceptance of their full membership in American society, and affirmation that their parochial schools were capable of inculcating patriotic as well as religious values. They believed themselves rewarded for playing by America's institutional procedures, by meeting both state educational guidelines and court rules, as well for acknowledging Constitutional gifts of individual liberty bestowed by a predominantly Protestant nation. Now, many Catholics resolved to assimilate by becoming fully American while holding onto their Catholic values. They would achieve their goal by doing their best to inculcate American citizenship values along with Church beliefs through parochial schooling of their immigrant youth.

Confident and proud of their new social standing, Catholics became more visible and active within the American scene**.** By 1920, their sheer numbers had risen to almost twenty million or 20% of the national population, an increase from eleven million in

310 Rogers M. Smith, *Civic Ideals*, p. 16.

1880.[311] Catholic school enrollment had swollen from just over 400,000 in 1880 to 1,701,219 students in 1920.[312] For some time the largest denomination in America, Catholics became more involved socially and politically. Open parades of the Holy Name Society became frequent and the building of parochial schools and hospitals occurred at a growing rate. Catholic political clans began to dominate city politics.

Yet all of this threatened Protestant power, causing Nativism to undergo yet another revival in the 1920's. Reformed "as an instrument of modern American nationalism," the Klu Klux Klan experienced swelling membership after issuing dire warnings that "average white Protestants were under attack."[313] Further, the Klan insisted that the Protestant "vision of America's national purpose and social order" was threatened and "their ability to shape the course of public affairs seemed to have diminished."[314] Nativist opposition proved a decisive factor in the 1928 election defeat of the first Catholic presidential nominee, Al Smith. Countering questions about papal encyclicals against religious freedom, Smith insisted that proven Catholic loyalty to the nation and laudable military service during the war outweighed doctrinal bickering. Despite his best efforts, more voters thought otherwise, electing Hoover over Smith. Yet, the American intellectual tolerance of Catholics first exhibited in the *Pierce Decision* was expressed in the aftermath of Smith's defeat when the editors of the *Outlook* wrote:

> "It should forever make it impossible for the form of a public man's religious

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[311] Patrick W. Carey, *Catholics in America* (Westport, CT: Praeger 2004), p. 57.
[312] Thomas C. Hunt, Ellis A. Joseph & Ronald J. Nuzzi, eds., *Catholic Schools in the United States: An Encyclopedia*, Vol. 1 (Westport, CT: Greenwood Press 2004), p. 2.
[313] John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925* (New York: Atheneum 1963), pp. 266, 287. *See* Dolan, *In Search of American Catholicism* , pp. 134.
[314] Leonard J. Moore, *Citizen Klansmen: The Ku Klux Klan in Indiana, 1921-1928* (Chapel Hill, NC: University of North Carolina Press 1991), p. 23. *See* Dolan, *In Search of American Catholicism,* pp. 134.

faith to become a political issue in this country."[315]

However, given the green light by judges and clergy, most American Catholics worked hard to shed their distinctiveness and to prove themselves dutiful citizens. Bishops now asked their people to surrender distinct expressions of their various ethnicities and become more American.[316] Taking the lead, Chicago Archbishop Mundelein abandoned his predecessor's policy of supporting ethnic parishes and instead, organized parishes by geography and required English as the language of parochial school instruction.[317] Responding to traditionalist clergy's critical appeal to the Vatican, Chicago Archbishop George Mundelein adamantly asserted:

> "It is of the utmost importance to our American nation that the nationalities gathered in the United States should gradually amalgamate and fuse into one homogenous people and, without losing the best traits of their race, become imbued with the one harmonious national thought, sentiment and spirit, which is to be the very soul of the nation. This is the idea of Americanization. This idea has been so strongly developed during the late war that anything opposed to it would be considered as bordering on treason."[318]

This time Rome refused to interfere, accepting the Archbishop's defense.[319]

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[315] "The Marshall-Smith Correspondence," *Outlook* 145 (1927) *quoted in* McGreevy, p. 149, ftn. 132.
[316] Dolan, *In Search of An American Catholicism*, p. 137.
[317] Archbishop Mundelein's efforts were adamantly resisted by Chicago's Polish Catholics, whom he was ultimately unable to change. In other areas, Americanization efforts of liberal clergy were resisted by Mexican Americans and other first generation immigrant populations. In the end, Archbishop Mundelein's Americanization policy was dubbed "one of his stinging defeats." Dolan, p. 140-141 *who cites* Joseph John Parot, *Polish Catholics in Chicago, 1850-1920* (DeKalb, IL: Northern Illinois University Press 1981),p. 72.
[318] Dolan, *In Search of An American Catholicism*, p. 139-140. *See also* Edward R. Kantowicz, *Corporation Sole: Cardinal Mundelein and Chicago Catholicism* (Notre Dame: University of Notre Dame Press 1983), p. 72.
[319] Dolan, *In Search of An American Catholicism*, p. 140. *See also* Dolan, *The American Catholic Experience* (Garden City, N.Y. : Doubleday 1985), pp. 300-301**;** Joseph John Parot, *Polish Catholics in Chicago, 1850-1920* (DeKalb, IL: Northern Illinois University Press 1981), p. 72.

With the economic distress of the Great Depression, American Catholics took a more active civic role. Their outreach was encouraged not only by the U.S. Supreme Court's *Pierce Decision*, but also by the Catholic social justice teachings of their church expressed in both Pope Leo XIII's *Rerum Novarum* (1891) and Pius XI's *Quadragesimo Anno* (1931).[320] The efforts of Catholic social reformers, ranging from Fr. John A. Ryan's work on a living wage to Dorothy Day's Catholic Workers' Movement, concretely addressed papal concerns about industrial infringement upon inherent human dignity, individual rights, and the common good. Influenced in part by Catholic reform efforts, American liberal democratic values of self-reliance and the right against government interference were challenged by more active republican notions of citizenship, such as social justice work and participation for the common good. Searching for answers to depression woes, Presidential Candidate Franklin Delano Roosevelt took notice. Partially inspired by Catholic notions, his proposals for change not only won the election, but sustained him in the longest tenure in the history of the U.S. Presidency.

Under his New Deal administration, many American Catholics rose to a new level of political influence and some involved with social justice pursuits were appointed to key governmental posts.[321] Numerous New Deal reforms and Roosevelt era public works projects were inspired by Catholic efforts. Public Catholicism attempted to bridge the widening gulf between their theological convictions and public realities.[322] They also

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[320] Patrick W. Carey, *Catholics in America* (Westport, CT: Praeger 2004), pp. 86-87; Dolan, *In Search of American Catholicism*, *pp*. 150-151.
[321] Carey, pp. 88-89; McGreevy, pp. 151-153.
[322] Dolan, *In Search of An American Catholicism,* pp. 146-147, 170-171, 180. In Dolan's words, public Catholicism "sought engagement with culture while encouraging a piety that placed Catholics in opposition to the dominant values of that culture. This anomaly has always been a challenge for Christianity – to establish a relationship with culture without succumbing to it in a way that corrupts the Gospel values." Id., p. 171. Finally, he describes public Catholicism as a "key development" that allowed American Catholics

continued to build Catholic hospitals and charities to meet the needs of parishioners and public alike.[323]

On the educational front, the U.S. Supreme Court stood behind its *Pierce Decision* by consistently overruling challenges to neutral state aid of public and parochial schools. From rulings in *Cochran v. Louisiana State Board of Education* (1931) to *Everson v. Board of Education* (1947), the Justices confirmed that the States could extend aid to all students (first in the form of text books and then as bus fare), so long as they did not differentiate between public or parochial attendees.[324] These decisions represented additional victories for Catholic education, further demonstrating the reluctance of the land's highest court to interfere with the public provision of school supplies meant to benefit students generally. The Court's acceptance of parallel public and parochial systems of education buoyed Catholic confidence in their newfound position in American society.

By the end of World War II, the hegemony of America's Protestants gave way to marked acceptance of a new religious mainstream commingling three faiths, "Protestant-Catholic-Jew."[325] Economic opportunities and suburban homes might have signaled Catholic entry into the American mainstream. Yet, it could not totally erase the intolerant

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"to break free from the insularity and sectarianism of the immigrant church" to enjoy the post-W.W. II economic and cultural advantages available in U.S. after 1950. Id., p. 180.

[323] McGreevy, pp. 162-163; Dolan, pp. 196-197.

[324] *Cochran v. Louisiana State Board of Education*, 281 U.S. 370; 50 S. Ct. 335; 74 L. Ed. 913 (1930); *Everson v. Board of Education*, 330 U.S. 1; 67 S. Ct. 504; 91 L.Ed. 711 (1947). See also James Hitchcock, The Supreme Court and Religion in American Life, Vol. 1 "The Odyssey of the Religion Clauses" (Princeton: Princeton University 2004), pp. 41-42, 159. Note that until 1947, the United States Supreme Court maintained an "accomodationist" position permitting government to assist all religions, so long as no one religion is preferred. After Justice Hugo Black's dicta in the *Everson v. Board of Education*, 330 U.S. 1; 67 S. Ct. 504; 91 L.Ed. 711 (1947), the U.S. Supreme Court would approach a more and more "separationists" position, supporting a strict wall of separation between church and state.

[325] This new mainstream was labeled "Protestant-Catholic-Jew" by writer Will Herberg in the groundbreaking work of the same name in the mid-1950's. *See* William R. Hutchison, *Religious Pluralism in America: The Contentious History of a Founding Ideal* (New Haven, CT: Yale University Press 2003), pp. 169, 201-204.

biases of the Protestant majority. Once again, education became the primary battleground over expression of American citizenship. The stage had been set by Justice Black's dicta in *Everson,*[326] indicating that a strict wall of separation must be maintained between church and state. Although he had ruled for neutral state reimbursement of student transportation costs, Black admitted to a law clerk that he calculated the decision a Pyrrhic victory for Catholics, who would soon be undone by strict separation.[327] In *McCollum v. Board of Education* (1948), the "wall" metaphor became the basis for the Justices' 8-1 decision. Together, they rejected the constitutionality of a local Illinois "release-time" program permitting parents to give permission for priests, rabbis, and ministers to enter public classrooms for an hour per week.[328] The *McCollum Case* foreshadowed, by two decades, the Supreme Court's adoption of the "strict wall of separation" as a new hurdle to public aid to religious education.[329]

Incited by Black's judicial pronouncements, many American Protestants vocally opposed any public aid for private religious ventures, especially education. Rallying around the "separation of church and state," Protestant separatists claimed that the

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[326] *Everson v. Board of Education of Ewing*, 330 U.S. 1, at 18, 67 S. Ct. 504, 91 L. Ed. 711 (1947).
[327] Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 4th ed. 2004) p. 462, ftn. 175. An active Baptist and Mason in his native Alabama, Justice Black's nomination to the U.S. Supreme Court was almost undone by the revelation that he had belonged to the Ku Klux Klan. Despite Catholic denunciations, he overcame the scandal by explaining that he joined the Klan out of political expediency and disclaiming any sympathy for Klan ideology. However, even his son recalled that his father held strongly anti-Catholic views. Ibid., at p. 464-465; Hutchinson, Vol. II, pp. 92-93.
[328] *McCollum v. Board of Education*, 333 U.S. 203; 68 S. Ct. 461; 92 L. Ed. 649 (1948). McGreevy, p. 183-185.
[329] *Lemon v. Kurtz*, 403 U.S. 602; 91 S. Ct. 2105; 29 L. Ed. 2d 745 (1971). In Lemon Case, the Supreme Court ruled unconstitutional Rhode Island stateue and Pennsylvania statutes which provided public supplements to parochial school teacher's salaries and student book purchases, respectively. For the first time, the Supreme Court not only created guidelines (the 3-prong Lemon Test) for applying the wall of separation dicta in *Everson*, but resolutely condemned public aid to religious schools. The Court insisted on strict separation of church and state , forbidding any excessive entanglement of the two.Based upon this premise, their new Lemon Test required that government aid to religious schools must (1) have a secular purpose; (2) have a primary effect that neigher advances nor inhibits religion; and (3) does not foster excessive government entanglement with relgion. Ibid., at 612-613, 622-623; *See McGreevey*, p. 263.

Establishment Clause would be violated by any government allocation of tax revenues to sectarian education. In opposition, Catholics insisted that the right to attend parochial schools was a Free Exercise of Religion issue. Since their tax dollars were being spent to support common schooling, only state reimbursements or tax credits would provide most Catholic parents with the financial freedom to choose religious schools for their children.

Nevertheless, the 1950's were a heady time for Catholics, as they defined their own distinctive American identity. Better educated and enjoying greater economic opportunity than their parents, they moved in droves to the suburbs. Modern suburban churches replaced aging urban immigrant parishes. These new churches had a mixed ethnic membership and so followed more uniform religious practices. However, suburban parishioners did not enjoy the strong ancestral ties and interpersonal relationships of their parents' congregations. Attempting to bequeath their Catholic traditions, parents who had the funds sent their children to parochial schools. The Catholic school system legitimized by the Supreme Court's *Pierce Decision* was stronger than ever. Catholic elementary school enrollment more than doubled from 1945-1959, totaling over 4 million primary school children by 1959.[330] American public schools also benefited from the post-war prosperity and optimism. In 1959, the public schools enrolled 36 million of the total 41 million U.S. school children.[331]

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[330] Dolan, *In Search of an American Catholicism*, p. 181.

[331] U.S. Dept. of Education "Table 10 - Enrollment in Regular Public and Private Elementary and Secondary Schools, by grade: 1910-11 to Fall of 1990," *120 Years of American Education: A Statistical Portrait* (Washington, D.C.: Office of Educational Research and Improvement, National Center for Education Statistics with Diane Publishing 1993), pp. 38-41, at p. 40. U.S. Dept. of Education, "Table 9 - Historical Enrollment in Regular Public Elementary and Secondary Schools," *120 Years of American Education: A Statistical Portrait* (Washington, D.C.: Office of Educational Research and Improvement, National Center for Education Statistics with Diane Publishing 1993), pp. 36-37, p. 37. According to these tables, total U.S. student enrollment for elementary and secondary schools (including all public and private school students) was 41,762,000 with 36,086,771 enrolled in public schools.

In the 1950's, the nation deemed its public school system the key instrument for addressing major political concerns. First, in *Brown v. Board of Education* (1954), the U.S. Supreme Court mandated the end of *de jure* segregation and racial integration of the public schools. The schools would serve as the central tool for achieving a democratic citizenship inclusive of African-Americans. Second, governmental and educational leaders decided to increase investment in scientific and mathematical education in an effort to overcome perceived Russian technological superiority after Sputnik. These educational reforms necessarily increased federal governmental involvement in the nation's classrooms, profoundly changing America's common schools and modern education for citizenship.[332]

By decade's end, no one could deny the rapid post-war political and economic advancement of America's Catholics.[333] They had demonstrated their dedication to the common good, their concern for the country's morals, and their loyalty to their nation. Shedding their isolated urban ethnic parishes for new homes and churches in the suburbs, Catholics also had become more assimilated into American society. In return, many of their neighbors regarded them as normal, hard working American citizens.

Yet when John F. Kennedy announced his presidential candidacy in 1959, he found that he still faced questions concerning his patriotism. Addressing the issue directly, insisted that a Roman Catholic citizen could be a loyal American leader, deciding political issues on the basis of public good rather than not papal dictate. His claim was widely debated, and ultimately believed. And, his assertion won Kennedy the 1960

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[332] John I. Goodlad, Corinne Mantle-Bromley, and Stephen John Goodlad, *Education for Everybody: Agenda for Education in a Democracy* (San Francisco: Jossey-Bass 2004), p. 64-65. *See also* William W. Brickman, "Educational Developments in the United States during 1959," *International Review of Education,* Vol. 6, No. 2 (1960), pp. 227-231.
[333] Dolan, *In Search of an American Catholicism,* pp. 183-185; McGreevy, pp. 211-214.

election. He became the first Roman Catholic President of the United States. In so doing, he assuaged the fear that a good Catholic could not also be a true American citizen and dedicated public servant. During his presidency, he called Americans to a renewed republican citizenship imbued with Catholic notions of self-sacrifice, as first demonstrated in his inaugural plea:

> " And so, my fellow Americans: ask not what your country can do for you—ask what you can do for your country."[334]

In 1962, **Pope** John XXIII convened the Second Vatican Council with the express purpose of throwing open the windows of the Catholic Church to the winds of modern change.[335] In an effort to update the Church, the Pope invited American priest and scholar John Courtney Murray to serve as the theological expert in their deliberations on church and democratic society. Murray became an instrumental figure in the drafting of the Council's formal Church declaration affirming every person's right to freely exercise their religious conscience in society. Within the next two years, Murray would help to author the Catholic Church's *Declaration on Religious Liberty*.[336] In doing so, Murray

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334 John F. Kennedy, Inauguration Speech (January 21, 1961). *See* Thurston Clarke. *Ask Not: The Inauguration of John F. Kennedy and the Speech That Changed America* (New York: Henry Holt & Company 2004), pp. 4, 9-11, 79.

335 Note that John Pope XXIII's term for the spirit of renewal, change, and reform fostered by the Vatican II Council was *aggriornamento* or the engagement of the Church with the modern world. Carey, p. 113. Concerning the antidote about Pope John XXIII, it is purported that when announced his intention to convene the Second Vatican Council, he opened a Vatican window and exclaimed: "I want to throw open the windows of the church so that we can see out and the people can see in." Sandra Martin, "Canadian Cardinal Vatican's Point Man on All Things Family," *The Globe and Mail*, Obituaries: Edward Gagnon (Canada: Wednesday, 8/29/2007), p. S9; *See also* The National Catholic Reporter, "Vatican II: 40 Years Later," accessed at http://ncronline.org/NCR_Online/archives2/2002d/100402/100402s.htm on 4/6/2008.

336 Second Vatican Council, *Declaration on Religious Liberty Dignitatis Humanae* (7 December 1965), nos. 2-3, in Vatican Council II, vol. 1, The Conciliar and Post Conciliar Documents, rev. ed. Austin Flannery, O.P. (New York: Costello Publishing Company, 1988), pp. 801-802. Since the 1940s, Murray had written and lectured about how American culture could shape Catholicism. He urged the Church to discard its medieval understandings of no rights for error and the union of church and state. In its place, he exhorted the Church to adopt the American positions of religious freedom and separation of church and state. As his writing became more pointed, he was advised in July, 1955 by his Jesuit superiors in Rome to write no more on these issues. Murray obeyed this directive until he received an invitation in 1963 from the

had succeeded in receiving the first official Church endorsement of a uniquely American ideal. And in the process, he shaped the Roman Catholic Church more in keeping with U.S. principles of religious liberty and personal autonomy than ever before dreamed possible.[337] At this time, Murray also helped shape his fellow patriots' understanding of a stronger, more tolerant democracy and a compassionate, religiously informed moral citizenship.[338]

These early 1960's successes proved the crowning achievements of the American Catholic legitimization bestowed by the U.S. Supreme Court's *Pierce Decision.* Subsequent events would diminish Catholic distinctiveness, divide the faithful, and encourage Catholic assimilation into American culture. Redefining the Church as the people of God, Vatican II thinned the liturgical ritual, outlawed Latin Mass, undermined traditional devotions, democratized parish governance, and encouraged Catholics to follow their individual moral consciences. Having celebrated the Church's sanction to think for themselves, America's liberal Catholics refused to give-up their new-found

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Vatican Council to serve as a theological expert. John Courtney Murray became instrumental in the drafting of the Council's *Declaration on Religious Liberty*. Dolan, p. 158-162; 250-252. *See also* McGreevy, p. 206.

[337] Dolan, p. 158-162; 250-252. *See also* McGreevy, p. 206. Murray made sure that the Vatican's advocacy of religious liberty was based upon human dignity and the natural rights of humans to be free from coercion. Yet, it is important to note that Murray brought Catholic doctrine into line with his own interpretation of American concepts of freedom of religion. Freedom of conscience was rejected twice as the basis for the Declaration on Religious Liberty because Murray understood the American constitution as prohibiting governmental interference with free religious exercise, not as official sanction of every religious expression of a free conscience manifest in error. For these reasons, Murray interpreted the First Amendment as primarily granting the right of religious free exercise, with freedom from government establishment of religion as an ancillary and supporting freedom. John Courtney Murray, *We Hold These Truths* (New York: Sheed and Ward 1960), pp. 37-39, 48-49, 76-78. *See* Francis Canavan, "Religious Freedom: John Courtney Murray and Vatican II," *Faith & Reason* 8 (1987): 329-333.

[338] Murray is significant for two reasons. He explained the task of Catholicism within U.S. society as one of making democracy safe for the American people. Murray reasoned that secular participation offered Catholics the opportunity to counter the negative social influences of individualism and materialism, and to transform the American moral order into one consistent with the teachings of Christ and the Church. Second, he was able to translate his unique understanding of American separation of church and state into a doctrine of religious liberty grounded in human dignity. *See* Murray, *We Hold These*, pp. 10-11, 17-18, 20-28, 61-63, 67, 332-336. Francis Canavan, "Religious Freedom: John Courtney Murray and Vatican II," *Faith & Reason* 8 (1987): 329-333.

moral independence. Encouraged by their church to modernize, seize their vocation as laity, and engage civil society, U.S. Catholics began to question the need for parochial education. Enrollment in Catholic schools began to decline after reaching its peak of 5.6 million students in the 1965-1966 academic year.[339]

In the decades to come, the legal tide vacillated with regard to public aid of parochial education. Beginning with the *Allen Decision* (1968), the U.S. Supreme Court struggled to define First Amendment liberties in the face of rising secularism and increasing religious conservatism.[340] For two decades, application of the three-prong test pioneered by the Warren Court in *Lemon v. Kurtzman* (1971) would secularize the nation's schools and ultimately, intensify conservative Protestant mistrust of the federal agenda.[341] In an effort to evade governmental control, Evangelical Protestant Christians founded their own schools and joined Catholic voices demanding public aid for parochial education. The power of their collective votes have served to influence Presidential elections and thereby, changed the judicial composition of the U.S. Supreme Court in their own favor.

By the time of *Mitchell v. Helms* (2000), conservative justices dominated the U.S. Supreme Court, three of whom were Roman Catholic.[342] Justice Thomas' plurality opinion in that school case directly attacked previous doctrines of "direct/indirect aid",

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[339] Thomas C. Hunt, Ellis A. Joseph & Ronald J. Nuzzi, eds. *Catholic Schools in the United States: An Encyclopedia*, Vol. 1 (Westport, CT: Greenwood Press 2004), p. 4. Note that Pope Paul VI sparked the American Catholic a rebellion when he appointed a panel of Church and lay experts to study birth control, only to ignore the results and write an encyclical against contraception. Having celebrated the Church's sanction to think for themselves, America's liberal Catholics refused to give-up their new-found moral independence. Hunt, p. 4.

[340] *Board of Education v. Allen*, 392 U.S. 236; 88 S. Ct. 1923; 20 L. Ed. 2d 1060 (1968).

[341] *Lemon v. Kurtzman*, 403 U.S. 602**;** 91 S. Ct. 2105; 29 L. Ed. 2d 745 (1971). The three-prong legal test was inaugurated by U.S. Supreme Court for the purpose of determining the constitutionality of state school aid under the First Amendment's Establishment Clause The test required that government aid to religious schools must (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion.[341] By mandating this test, the Supreme Court not only created guidelines for applying that the wall of separation dicta in *Everson*, but resolutely condemned public aid to religious schools.[341]

[342] *Mitchell v. Helms*, 530 U.S. 793; 120 S. Ct. 2530; 147 L. Ed. 2d 660 (2000).

"divertibility", and "pervasively sectarian" as "born of bigotry" and anti-Catholic prejudice.[343] Instead, the *Mitchell Case* reconfirmed the principles of neutrality and private choice as sufficient grounds for determining the constitutionality of Jefferson Parish, Louisiana's allocation of Chapter Two assistance to all needy students.[344] Within two years, the U.S. Supreme Court's 5-4 decision in *Zelman v. Simmons-Harris* held a school voucher program constitutional.[345] With the *Mitchell* and *Zelman* decisions, the Supreme Court majority finally abandoned the Jeffersonian wall of separation between public aid and religious schools first advocated almost sixty-six years ago by Justice Hugo Black's dicta in *Everson v Board of Education*.[346] In doing so, the Court chose to replace a separatist interpretation of the Establishment Clause with a more accomodationist, disestablishment reading. The *Zelman* decision stands as a testament to the persistence of Catholic efforts, and their newfound political strength when joined with the evangelical movement in promoting private religious education in the United States.

In the final analysis, evangelical Christians, whose ancestors had strongly resisted Catholic influence in America, chose to shape alliances with Catholic interests in order to retain their influence and successfully advocate for public aid to private schools. Further, it is worth noting that just as Catholics became fully integrated into the mainstream and

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[343] *Mitchell v. Helms*, 530 U.S. 793, at 829.

[344] Specifically, the Supreme Court held constitutional Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C.S. §§ 7301-7373 because it provided for government aid to both public and private schools. Thus, it did not result in religious indoctrination by the government nor defined its recipients by reference to religion. For these reasons, the law was not an establishment of religion.

[345] *Zelman v. Simmons-Harris*, 536 U.S. 639**;** 122 S. Ct. 2460; 153 L. Ed. 2d 604 (2002). The Court's majority opinion determined the Ohio's school voucher program to be "neutral" with respect to religion, providing parents with "true private choice" over where to school their children and direct their tuition aid.

[346] Everson v. Board of Education, 330 U.S. 1; 67 S. Ct. 504; 91 L.Ed. 711 (1947). As Robert Chanin, General Counsel for the National Education Association (NEA) stated, when asked to explain his organizations opposition to school vouchers, "if a state can take millions of dollars, hand it over to sectarian schools, which is then used to provide a religious education, it seems to me that you have punched a gaping hole in the wall of separation between church and state." Robert Chanin, "Fox Special Report with Brit Hume," February 19, 2007.

strongly represented upon the U.S. Supreme Court, evangelicals judged society godless and chose to separate themselves from the mainstream to the point of schooling their children in sectarian schools. In the context of a widening American pluralism that includes Muslim, Hindu, and Buddhist, Catholicism no longer appears a substantial threat to Protestant Christianity but rather a potential ally in preserving a predominant influence for Christian culture.

The U.S. Supreme Court's *Pierce Decision* and its aftermath have proven to be a fulcrum which propelled Catholics into the American mainstream. Demonstrating their patriotic duty through citizenship education and loyal service, Catholics successfully negotiated the existent tensions between rights and duties. Publicly conceding their debt to the Protestant vision of liberty, they won their rightful claim to privately educate their children within a parochial school system. Bolstered by the Society of Sisters' victory, Catholics embraced their American citizenship and fused their religious self-understanding with U.S. values. Through civic charities and public service, the faithful helped to define the country's common good and worked to meet their duty to their fellow citizens. Thus, duty became the operative cutting edge for Catholic assimilation into U.S. society. Over time, the grant of full citizenship from the American majority followed, as demonstrated by Kennedy's assumption of the Presidency. While private education continues to be the defining issue for America's Catholics, it has become the concern of a growing number of other citizens including Protestant evangelicals. By joining forces with Catholics, some Protestants seek to preserve Christian dominance of American culture. Ironically, they no longer question Catholic patriotism. Rather, they

seek to enlist Catholic support in their attempt to forestall the integration of more diverse minority religious groups into the full rights and obligations of American citizenship.

Today, the composition of the U.S. Supreme Court has changed again with the Republican appointment of two new justices. Chief Justice Roberts and Justice Alito join Scalia, Thomas, and Kennedy to form the first Catholic majority on the U.S. Supreme Court. Is this a sign that as Catholics citizens have assimilated fully into U.S. culture, they have traded their religious distinctiveness for increasing political power? Or, is it an affirmation of John Courtney Murray's assessment that in recognizing their own teleology in the American elevation of inalienable rights, American Catholics have a unique contribution to offer U.S. democratic understanding? One thing remains certain. The shifting balance of political power between liberals and conservatives, Catholics and Protestants, secular and religious insures that the American understanding of citizenship and its interaction with the First Amendment religion clauses will continue to evolve. Challenges from other minority religious groups, such as Jews and Muslims, address new tensions and different elements as the American understanding of citizenship unfolds through the official arguments presented before courts and the unofficial conversations shared within the American public square.

Chapter 5: The Reform-Conservative Debate:
Orthodox Jewish Duty & American Civic Membership (1945-1966)

The Supreme Court's *Pierce Decision* resulted in more than the legitimation of the parochial school system.[347] Along with the Court's holding in *Meyers v. Nebraska*, it exhibited the Court's willingness to uphold minority religious rights in the face of Protestant majoritarian attempts to impose systematized conformity.[348] This important legal precedent encouraged aspirations of American success in both immigrants and minority religious alike. As U.S. Catholics made social inroads through parochial education, American Jews strived for economic independence as a means to evade prejudice and sustain their community. So, Jews embraced the American public school system as their children's path toward occupational success.[349] Largely excluded from the nation's established corporate and industrial sectors, the adults succeeded in establishing small retail enterprises and integral merchandising networks. Communal structures and family operated business not only provided a formula for economic success, but also the opportunity to retain those Jewish traditions which defined their communal bonds, such as *Shabbat*.[350]

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[347] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510; 45 S. Ct. 571; 69 L. Ed. 1070; 1925 U.S. LEXIS 589; 39 A.L.R. 468 (1925).
[348] *Meyers v. Nebraska*, 262 U.S. 390, at 402, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1146 (1923). *See* Bond, *I Dissent*, p. 73.
[349] Carmel U. Chiswick, "The Economics of American Judaism," *The Cambridge Companion to American Judaism* (Cambridge, UK: Cambridge University Press 2005), pp. 315-325, at p. 318; Lloyd P. Gartner, "Assimilation and American Jews," *Jewish Assimilation in Modern Times*, (Boulder, CO: Westview Press 1981) pp. 171-183, at p. 173.
[350] *Shabbat* is the practice of keeping holy the Lord's day, both required and defined by the Torah as the Seventh Day of the week (Saturday). Regarding Jewish commercial adaptations *see* Charles Dellheim, "The Business of the Jews," *Constructing Corporate America: History, Politics, Culture*, K. Lipartito and D. B. Sicilia (Oxford, UK: Oxford University Press 2004), pp. 223-245, at pp. 230-231, 233, 235-237, 242; Waxman, *Jews in America* (Hanover, NH: Brandeis University Press 1999), pp.. 7-15, at pp. 12-13; Nathan Reich, "Economic Status," *The American Jew: A Reappraisal*, O.I. Janowsky, ed. (Philadelphia, PA: The Jewish Publication Society of America 1964), pp. 53-74 at p. 64.

While America's Catholics encountered the intersection of inalienable rights and citizenly duties, distinctive Jewish practices challenged ascriptive notions of American membership. Although US Jews supported a secular public as essential for religious liberty, they often found that maintaining their commercial success raised challenges for preserving their faith. After W.W. II, the decline of anti-Semitism and unprecedented economic prosperity contributed to Orthodox Jewish retail success. Closing for religious observances on Saturdays, Jewish shopkeepers attempted to recoup their losses by offering Sunday store hours. Shoppers of all faiths took advantage of this convenience. In time, Jewish businesses began to be confronted by local authorities, as their competitors called for stricter enforcement of Sunday closing laws.[351]

Eventually, the Supreme Court would be called upon to resolve these tensions. Their plurality decision favored existing social norms and common practices. Yet, public values were changing rapidly in the wake of post-war suburbanization and secularization. By 1969, their decision, like the blue laws themselves, would be largely inconsequential as Americans increasingly patronized Sunday businesses. By investigating the history and outcome of the Supreme Court's *Braunfeld v. Brown Decision*, we will observe the tensions that American Jews faced between meeting *halakhahic* duties and enjoying civic membership.[352] Also, we will witness how membership issues formed the cutting edge which ultimately compelled three diverse Jewish adaptations to American society.

[351] Milton R. Konvitz, "Inter-Group Relations," *The American Jew: A Reappraisal*, O.I. Janowsky, ed. (Philadelphia, PA: The Jewish Publication Society of America 1964), pp. 75- 99, at p. .84
[352] *Braunfeld v. Browns*, 366 U.S. 599; 81 S. Ct. 1144; 6 L. Ed. 2d 563 (1961).

A. Seeking American Citizenship

Like Catholics, Jews had been in America since Colonial times but experienced rapid growth with the waves of European immigration starting in the 1820's.[353] Although constituting a much smaller minority than Catholics, Central European Jews became the first significant ethnically Semitic wave. Mostly Germans and Poles, the émigrés arrived in the United States from 1820-1860. They came fleeing the Napoleonic Wars, failed liberal revolutions in Europe, and their aftermath. Hailing from largely secularized cosmopolitan environments, these Central European Jews sought economic success in America and assimilated rapidly in their new homeland.[354]

The subsequent mass immigration of Eastern European Jews, largely Russian, came from much smaller and more insular communities. Until the pogroms forced their exodus, Eastern European Jews had resisted persecution and perpetuated their culture by isolating themselves from the rest of society. In their own towns and villages, they had developed an ethnocentric identity and strong in-group loyalties which they brought with them to America. Arriving between 1880 and 1923, these communal orientations complicated

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[353] Jews accompanied Christopher Columbus on his discovery voyage to America. Peter Wiernik, *History of the Jews in America: From the Period of the Discovery of the New World to the Present Time* (New York: Hermon Press, 3rd ed. 1972), pp. 10-19. Yet, the first recorded Jewish settler in America was Joachim Gaunse who arrived in 1585 as the mining technologist and metallurgist to serve the ill-fated colony of Roanoke, Virginia. Although he stayed less than a year, he was followed in 1654 by the famous twenty-three Jewish refugees from the Portuguese capture of Recife, Brazil who settled in New Amsterdam. Jonathan D. Sarna, "American Jewish History," *Modern Judaism*, Vol. 10, No. 3 (Oct. 1990), pp. 343-365, p. 358 citing Lewis S. Feuer, *Jews in the Origins of Modern Science and Bacon's Scientific Utopia: The Life and Work of Joachim Gaunse, Mining Technologist and First Recorded Jew in English-Speaking North America*, Brochure Series of the American Jewish Archives #6 (Cincinnati, 1987). .Sephardic Jews from Spain and Portugal predominated in the American colonies and the United States until 1735 when they were surpassed in numbers by Ashkenazi Jews from the Germanic countries of Central Europe. However, the two groups got along well and shared the same synagogues. Nathan Glazer, "Social Characteristics of American Jews, 1654-1954," *American Jewish Year Book* , Articles in Celebration of the Jewish Tercentenary 1654-1954, Vol. 53 (1954), pp. 3- 62 at p. 5.

[354] Jacob Rader Marcus, "Background for the History of American Jewry," *The American Jew: A Reappraisal* , Oscar I. Janowsky, Ed. (Philadelphia, PA: The Jewish Publication Society of America 1964), pp. 1-25, at p. 2. *See also* Edward Queen, "Judaism," *The Encyclopedia of American Religious History*, Vol. I, E. L. Queen, S.R. Prothero, & G. H. Shattuck, Jr. (New York: Proseworks 1996), pp 333-341, at p. 335.

their relationship with the pre-existing U.S. Jewish population and impeded their adaptation to American life.[355]

A diaspora people, the Jews had been perceived as sojourners in the lands in which they settled. With the emergence of modern political states in Europe, Jews were often able to achieve citizenship only through renunciation of their Jewish religious identity. American constitutional liberties assured Jews of full political rights under the federal government, including the right to vote and hold office. In the United States, Jews enjoyed the promise of unrestricted individual citizenship.[356] Unfortunately, the laws of the separate states were much slower to grant these same guarantees. While Jews could both vote and vie for Federal office in the 1790's, they were precluded from the franchise in many states until as late as 1876.[357] And, federal citizenship was defined on an individual basis which remained blind to religious affiliation and communal membership. Granting unprecedented religious liberty, American law regarded all faiths as voluntary associations as opposed to a defining religious identity or ethnic group membership.

Thus American law has continued to treat citizen-members as individual voluntary adherents, an assumption that conforms to the dominant Protestant model. When liberty is granted on a personal basis, religious communities are denied group recognition or

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[355] Chaim I. Waxman, "the Sociohistorical Background and Development of America's Jews," *Jews in America: A Contemporary Reader* , R. R. Farmer & C.I. Wasman, eds. (Hanover, N.H.: Brandeis University Press 1999), pp. 7-31, at p. 7.

[356] Article IV of the United States Constitution (1987) signaled the availability of full political membership by banning religious qualifications for federal office. Subsequently, the American Bill of Rights ratified in 1789 included the First Amendment guarantees against the federal government's establishment of religion or interference with its free exercise. Together, these Constitutional liberties assured Jews of full political rights under the federal government, including the right to vote and hold office. Jews enjoyed the promise of unrestricted individual citizenship. *See* Lloyd P. Gartner, "Assimilation and American Jews," *Jewish Assimilation in Modern Times*, Bela Vago, ed. (Boulder, CO: Westview Press 1981), pp. 171-183 at p. 172.; Daniel J. Elazar and Stephen R. Goldstein, "The Legal Status of the American Jewish Community," *American Jewish Year Book*, Vol. __ (1972), pp. 3-89, at p. 6.

[357] New Hampshire was the last state to grant the franchise to Jews , which it finally did in 1876. *See* Holly Snyder, "Rules, Rights and Redemption: The negotiation of Jewish Status in British Atlantic Port Towns 1740-1831," *Jewish History*, Vol. 30 (Spring 2006), pp. 147-170 at p. 164.

legal status. [358] Under Jewish Law, Jews are regarded as members of the Jewish People from birth. After dispersion from their homeland, the Jewish people sought to retain their national character through their observance of the *halakhah*, whose legal confines defined their communal identity in the absence of territorial borders.[359] Jewish law was all-encompassing, possessing implications for every aspect of the adherents' lives. While American law considered citizens to be individuals endowed with inalienable rights and religion as a voluntary endeavor, Jewish law emphasized the good of the community and required adherence to the Torah.[360] The legal history of Jewish struggles for political participation, along with accommodation of their group identity and practices, have been key to the development of their understanding of membership as U.S. citizen.

Further complexity was added to this development as various groups of Jewish immigrants and their progeny came to differ in their understandings of *halakhah* and their adherence to its requirements. Defining Orthodoxy in America became a major Jewish endeavor that troubled membership in the Jewish community as well as affected their citizenship within the larger American society.[361] These differences, combined with the

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[358] *See* Daniel J. Elazar and Stephen R. Goldstein, "The Legal Status of the American Jewish Community," *American Jewish Year Book*, Vol. 73 (1972), pp. 3-89 at pp. 5-6,

[359]Daniel J. Elazar and Stephen R. Goldstein, "The Legal Status of the American Jewish Community," *American Jewish Year Book*, Vol. 73 (1972), pp. 3-89 at p. 81.

[360] Daniel J. Elazar and Stephen R. Goldstein, "The Legal Status of the American Jewish Community," *American Jewish Year Book*, Vol. 73 (1972**),** pp. 3-89, at pp. 5-6.

[361] As a result of immigration, American Judaism experienced the same type of denominationalism as Protestant Christianity in America. Immigrants arriving from all over the world brought with them different brands of Orthodoxy. Others, like Mordecai Kaplan, preferred to define Judaism in contemporary American terms. This resulted in the rise of different American branches of Judaism In general terms, Orthodox were those Jews who insist the all Torah commands must be practiced. The Orthodox fear that permitting alternative definitions of Jewish identity will destroy Jewish unity and thus, Judaism. Conservatives understand Jewish law to be binding, but evolving. Reform Jews believe only those Torah commands that are spiritually meaning should be observed today. Reconstructionists believe Judaism is an evolving civilization with religion at its core but not its total nature. Secular Jews are those who identify with the culture of Judaism but do not necessarily adhere to its religious tenets. Dana E. Kaplan, ed. *The Cambridge Companion to American Judaism* (New York: Cambridge University Press 2005), pp. 14-15, 126-127,

lack of a universally recognized Jewish authority in the United States, created rifts in synagogue communities. Ultimately, this led to the same type of American denominationalism in Judaism that had developed in Protestantism.[362]

B. Sabbath Defines Jewish Membership

Jewish ways differed, not only from other Americans, but from each other depending upon their origins and their observance. One ritual practice in particular distinguished Jews from their Christian and secular neighbors. Jewish differences became highly visible around the issue of keeping holy the Sabbath. From colonial times, local American governments enacted Sunday closing laws designed to force strict religious observance and deter business on the Christian Sabbath. These Sunday regulations were dubbed blue laws based upon the paper upon which they were printed and the true blue character of their principles.[363] These laws have long have been accepted as a legally valid exercise of the state's police powers over health, safety, and welfare. The states' purported purpose for Sunday closing laws have evolved from religious observance to a common day of communal rest. Under local blue laws, all citizens were precluded from working on the Christian Sabbath, unless the municipal or state legislature granted Sabbatarians a legal exemption.

Despite Christian Sunday observance, Orthodox and Conservative Jews sought to keep holy the biblical Sabbath, Saturday.[364] Under the Fourth Commandment of the

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[362] Edward Queen, "Judaism," *The Encyclopedia of American Religious History*, Vol. I, E. L. Queen, S.R. Prothero, & G. H. Shattuck, Jr. (New York: Proseworks 1996), pp 333-341, at p. 340.
[363]David N. Laband and Deborah Hendry Heinbuck, *Blue Laws: The History, Economics, and Politics of Sunday-Closing Laws* (Lexington, MA: Lexington Books 1987), p. 8
[364] Under the fourth of the Ten Commandments, the seventh day of the week (or Saturday) is to be kept holy as the Sabbath. Exodus 31: 12-17. As the seventh day, Saturday is the seventh day of creation and the day on which God rested, as described in Genesis. *See* Edward Queen, "Sabbatarianism," *The*

Torah, Jews are required to "keep holy the Lord's Day."[365] God's command obligates members of the Jewish community to totally abstain from business and all manner of work on the Sabbath, defined as the period from sun-set each Friday until the following nightfall on Saturday.[366] Just as the Lord's Day requires both personal and communal observance, it couples *zachor* (cognitive remembrance) with *shamor* (physical observance).[367] The first is a personal, private act of reason while the second is public, communal engagement in worship and rest.

Observant Jews begin Shabbat with the mother's lighting of two candles in remembrance of God's role as Creator and Liberator from slavery in Egypt. Before Shabbat dinner, the husband, sometimes with family in tow, will walk to Friday night synagogue services, which includes Psalm 92, the song of Shabbat. Because it is God's time, work is strictly forbidden throughout the Sabbath. Instead, the family engages in rest along with the sanctification of worship and scripture study. Together, they attend Saturday morning liturgy with some members returning for Minhah, the afternoon service prior to the sunset. Traditionally, the Havdalah or Hebrew prayer of "separation" formally closes the Sabbath, partitioning God's holy day from the rest of the week.[368]

Observing the Sabbath meant closing business before sunset on Friday evenings and the entire day of Saturday. Blue laws further reduced the observant Jews' profits by

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Encyclopedia of American Religious History, Vol. II, E. L. Queen, S.R. Prothero, & G. H. Shattuck, Jr. (New York: Proseworks 1996), pp. 580-581, at p. 580.

[365] *See* Ex. 20:8,and Dt. 5:12. *as well as* Gen. 1: 5b,. *See also* Neil J. Dilloff, "Never on Sunday: The Blue Laws Controversy," 39 Maryland Law Review 679 (1779-1980) at p. 679, ftn. 4. *and* Christopher D. Ringwald, *A Day Apart*, (New York: Oxford University Press 2007), p. 19-20.

[366] *See* Ex. 20:8,and Dt. 5:12. *as well as* Gen. 1: 5b,. *See also* Neil J. Dilloff, "never on Sunday: The Blue Laws Controversy," 39 Maryland Law Review 679 (1779-1980) at p. 679, ftn. 4. *and* Ringwald, *A Day Apart*, p. 19-20.

[367] Ex. 20:8 opens with the command of *zachor* ("Remember the Sabbath Day") while Deut. 5:12 begins with the requirement of *shamor* ("Observe the Sabbath Day"). *See* W. Gunther Plaut, "The Sabbath as Protest," *Tradition and Change in Jewish Experience* , A. L. Jamison, ed. (Syracuse, NY: Syracuse University 1978), pp. 1690183, at p. 172.

[368] Ringwald, pp. 19-20; Plaut, p. 172 and 175.

requiring closing on Sunday and the loss of a second business day. Strict adherence to the Sabbath had made it difficult for Jews to fit into regular occupational patterns in America's capitalist society. For this reason, Jews tended toward small, family-run business and self-employment.[369] During colonial times, American Jews were occupied mainly as middle-men merchants in fledgling port cities like New York, Philadelphia, Newport, and Charleston. The nineteenth century Jewish-Germanic immigration brought more cosmopolitans who succeeded as merchant bankers and entrepreneurs, investing their profits and eventually building major business enterprises. Finance, banking, real estate, wholesale of consumer goods, and cultural services were their chosen occupational pursuits and served as the basis for their upward social mobility. Later, their New York garment factories often served as the first employment opportunity for Eastern European Jews entering the United States. Through entrepreneurship and hard work, these late-comers would likewise move on to better jobs and investment in their own business.[370]

Although not nearly as intense as in other countries, anti-Semitism did exist in the United States. Jewish immigrants had to face not only the prejudice against foreign-born, but also antipathy toward their religious-ethnic identity. Largely inherited from Europe, American Anti-Semitism consisted not only of attitudinal hostility but also blatant

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[369] Jacob Rader Marcus, "Background for the History of American Jewry," *The American Jew: A Reappraisal* , O. I. Janowsky, ed. (Philadelphia: The Jewish Publication Society of America 1964), pp. 1-25), at p. 11.

[370] Charles Dellheim, "The Business of Jews," *Constructing Corporate America: History, Politics, and Culture* , K. Lipartito & D. Sicilia, ed. (New York: Oxford University Press, Inc. 2004), pp 223-245,. at pp. 229-233, Chiswick, "The Economics of American Judaism," *The Cambridge Companion to American Judaism*, (New York: Cambridge University Press 2005), pp.315-325, at p. 317; Carmel Ullman Chiswick, 'Economic Adjustment of Immigrants: Jewish Adaptation to the United States," *Jews in America: A Contemporary Reader*, R. R. Farber & C. I. Waxman, eds. (Hanover, N.H.: Brandeis University Press 1999), pp.16-27, at p. 19. Chaim I. Waxman, "The Sociohistorical Background and Development of America's Jews," *Jews in America: A Contemporary Reader*, R. R. Farber & C. I. Waxman, eds. (Hanover, N.H.: Brandeis University Press 1999), pp. 7-17, at, pp. 8-13.

discrimination in housing, education, and employment. Sometimes it turned violent, as in the Atlanta lynching of Leo Frank.[371] While only isolated incidents of Jewish prejudice surfaced during the Colonial period when Jews numbered just 200-300 persons, the wave of 750,000 European immigrants between 1801and 1840 brought with them anti-Jewish sentiments.[372] Their antipathy was exacerbated by the 1881-1925 influx of 2.5 million insular, strictly-observant Eastern European Jews escaping Russian pogroms.[373] The dual phenomena of eugenics and the "Red Scare" after the Russian Revolution prompted Congress to restrict immigration in 1921 and again in 1924, reducing Jewish immigration from 10.3 % of all immigrants in 1921-1294 to a scant 3.7 % in 1925-1929.[374] Rise in nativist sentiments during the 1920's included the anti-Jewish animus of the Ku Klux Klan, the prejudiced railings of popular Catholic radio personality Fr. Charles Coughlin, and the anti-Semitic vitriol of Baptist industrial leader Henry Ford widely published and distributed in his own newspaper, the *Dearborn Independent.*[375] Ironically, the Know-Nothings, who continually harassed Catholics and attacked their political loyalty, were staunch supporters of the Jews whom they viewed as true patriots and genuine republicans.[376]

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[371] Spencer Blakeslee, *The Death of American Antisemitism*, (Westport, CT: Praeger Publishers 2000), pp. 15-16.
[372] Hasid R. Diner, *The Jews of the United States* (Berkeley, CA: University of California 2004), p. 88.
[373] David Vital, *A People Apart* (New York: Oxford University Press, USA 1999), pp.298-299; Diner, p. 88,
[374] Diner, pp. 89-90. Rufus Learsi, *Jews in America: A History*. (Cleveland: The World Publishing Co. 1954), pp. 162-163.
[375] Blakelee, *The Death of American Antisemitism*, pp. 20, 26, 31-33 *and* Yaakov Ariel, "American Judaism and Interfaith Dialogue," *The Cambridge Companion to American Judaism*, D. E. Evans, ed. (New York: Cambridge University Press 2005), pp. 327-344, at pp 229-330. Note that a lawsuit was filed against Ford by a prominent Jewish lawyer which resulted in an adverse court ruling against the famous industrialist. Henry Ford was forced to recant his many prejudicial statements against Jews. Soon thereafter, Ford closed the *Dearborn Independent*.
[376]Alan Mittleman, "Judaism and Democracy in America," *The Cambridge Companion to American Judaism*, D. E. Evans, ed. (New York: Cambridge University Press 2005), pp. 299-313, p. 299 citing

With the deepening of the Depression, antipathy for the Jews was increasingly expressed by politicians and agitators. A large percentage of Americans came to accept anti-Semitic stereotypes. In the late 1930's and early 1940's, public opinion surveys revealed that nearly two-thirds of Americans considered Jews to have "objectionable traits" being "mercenary, clannish, pushy, crude, and domineering." In addition, over one-half of Gentile Americans considered Jewish businessmen to be less honest than other business people while only 3 % assumed that they were more honest.[377] In his famous September 1941 speech, "Who are the War Agitators?," Transatlantic Pilot and American Hero Charles Lindbergh added to Jewish antipathy by defaming Jews as disloyal agitators, accusing them of objecting to the U.S. entry into W.W. II.[378]

As an exceedingly small minority, most Jews chose to fight these stereotypes by concentrating on their own upward social, economic mobility as well as demonstrating their patriotism through military service and active contributions to the success of the Allied War effort. The Second World War soon eased interfaith relations and a shared set of beliefs foundational to U.S. society.[379] The genuine depth of this new American interfaith solidarity was tangibly demonstrated by the 1944 martyrdom of the "four chaplains." Consisting of a rabbi, priest, and two Protestant ministers, these military clergy stood together on the sinking deck of the Dorchester. Giving away their life preservers to save others, the three were said to have been heard singing and praying

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Stephen Macedo, *Diversity and Distrust: Civic Education in Multicultural Democracy* (Cambridge, MA: Harvard University Press 2000), p. 62.

[377] Edward S. Shapiro, *A Time for Healing: American Jewry Since World War II* (Baltimore, MD: The Johns Hopkins University Press 1992), p. 5.

[378] Shapiro, *A Time for Healing*, p. 6.

[379] However, the fact that the term "Judeo-Christian" was used by the mainstream to reflect this openness was problematic. Not much consideration, if any, was given to the fact that many Jewish thinkers find this term inaccurate and highly offensive. Thus, it was just another symptom of the Christian domination and religious insensitivity of the American mainstream.

together as they went down with the ship.[380] Although the year 1944 proved the highpoint of American anti-Semitism, the sentiment rapidly dissipated after 1945.[381]

Conflict between demonstrating membership in religious society through Sabbath observance and conforming to American social norms of the six-day workweek not only divided American Jews, but tended to separate the observant from U.S. society. For many, avoidance of work on the Sabbath faded as either they or their children aspired to "fit in" to American society and take advantage of the opportunities for commercial success.[382] Yet, in certain Jewish Orthodox enclaves, *halakhahic* observances were strictly followed due to their emphasis upon pious adherence and communal religiosity. As Edward Queen has observed, "Orthodoxy" became both "a self-conscious position" and "an American phenomenon" because new immigrant communities were suddenly forced to define their Jewish faith in the face of other existing options.[383]

Within the first half of the twentieth century, many American Jews had rapidly transitioned from blue-collar workers to white-collar businesspersons and professionals.[384] According to Lloyd P. Gartner, American Jewry "sought acceptance into the white merchant and professional classes in the United States."[385] Unlike Orthodox and Conservatives, Reform and Reconstructionist Jews tended not to be so literal in their

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[380] William R. Hutchinson, *Religious Pluralism in America: The Contentious History of a Founding Ideal* (New Haven, CT: Yale University Press 2003), pp. 197-198.
[381] The dissipation of American Anti-Semiticism has been linked to news of the Shoah, revelations from the war-crimes tribunals, and the establishment of the State of Israel. Shapiro, *A Theme for Healing*, p. 7 *and* Blakelee, *The Death of American Antisemitism*, p. 37.
[382] Queen, "Judaism," *The Encyclopedia of American Religious History*, Vol. I, E. L. Queen, S.R. Prothero, & G. H. Shattuck, Jr. (New York: Proseworks 1996), pp 333-341, at p. 338.
[383] Queen, "Judaism," p. 338.
[384] Chiswick, "Economic Adjustment of Immigrants," p. 19.
[385] Lloyd P. Gartner, "Assimilation and American Jews," *Jewish Assimilation in Modern Times*, B. Vago, ed. (Boulder, CO: Westview Press, Inc. 1981), pp. 7-183, at p. 176.

interpretation or as strict in their observance of the Fourth Commandment.[386] Their flexibility concerning religious observance of the Sabbath gave them an assimilative and commercial advantage, allowing them to operate their businesses on Saturday and remain profitable despite the Sunday commercial closing required under the blue laws. While commercial success brought many American Jews cultural legitimacy and political power, visible ethnicity and Sabbath adherence affected their ability to successfully navigate and ultimately penetrate white Protestant corporate America.[387] For this reason, the 1930-1935 study of the "Yankee City" Jewish community by W. Lloyd Warner and Leo Srole concluded with a plea for Jews to break with traditional religious patterns and relax their Sabbath observances if they were to successfully compete within America's economic sphere.[388]

As W.W. II drew to a close, American Jews emerged united as never before. Previously antagonistic strains of Germanic and Russian Jews had come together with the children of their Shephardic predecessors as Semitic Americans to support their nation's combat against the Axis powers and to oppose Nazi persecution. At the War's end, American Jews understood their unique obligation as the last remaining remnant obligated to carry on their religious legacy. Acting as the world's conscience, they kept

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[386] Emphasizing social accommodation, the Reform Movement emerged during the mid-1800's and soon began to experiment with "second Sabbath" services on Sunday morning to benefit those compelled to work on the Sabbath. Other Reform rabbis added late Friday and early Saturday services to accommodate those who had no choice given six-day work weeks. Many adult Jews said a Yiddish prayer for prosperity in hopes that their children would not be force to desecrate the Sabbath., Christopher D. Ringwald, *A Day Apart: How Jews, Christians, and Muslims Find Faith, Freedom and Joy on the Sabbath* (New York: Oxford University Press 2007), ,pp. 147, 161-162.

[387] Dellheim, "The Business of Jews," p. 229. Kenneth Lipartito and David B. Sicilia, "Introduction: Crossing Corporate Boundaries,", *Constructing Corporate America: History, Politics, and Culture* , K. Lipartito & D. Sicilia, ed. (New York: Oxford University Press, Inc. 2004), pp.1-28, at p. 21.

[388] W. Lloyd Warner and Leo Srole, *The Social Systems of America Ethnic Groups, Yankee City Series* , Vol. III (New Haven: Yale University Press 1945) *cited in* Waxman, "The Sociohistorical Background and Development of America's Jews," *Jews in America: A Contemporary Reader,* R. R. Farber & C. I. Waxman, eds. (Hanover, N.H.: Brandeis University Press 1999), pp. 7-17, at p. 13.

the Shoah alive in international memory in an effort to prevent those terrible events from ever being repeated.

The Jewish ethic of *tikkun olam* ("repair of the world") became the touch-stone for personal and organizational acts of social justice and active support for the emerging Civil Rights Movement.[389] Together, they joined behind common causes of Shoah remembrance, support for the newly established State of Israel, and efforts to combat all forms of discrimination.[390] At the same time, they welcomed and sponsored the tens of thousands of Orthodox Jewish survivors of the Nazi persecution who began arriving in the U.S. The refugees flooded New York, Philadelphia, and Chicago, which had long served as the primary U.S. gateways for Jewish immigrants. Initially, they congregated in the urban ethnic enclaves of large North Eastern and Mid-Atlantic cities, where they drew support from their American brethren. Eventually, they would join other Jews in a mass exodus to the American suburbs and efforts to recreate Jewish communities there.[391]

Generally, the post-W.W. II decade was a time of American religious renewal and interfaith cooperation. In a 1952 interview with a *New York Times* reporter, President-Elect Dwight Eisenhower asserted that "our government makes no sense unless it is founded in a deeply religious faith – and I don't care what it is."[392] A short time later, Sociologist Will Herberg postulated the rise of a new 3-fold mainstream of *Protestant-*

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[389] Debra Schultz and Blanche Wiesen Cook, *Going South: Jewish Women in the Civil Rights Movement* (New York: NYU Press 2001), p. 190

[390] Jacob Rader Marcus, "Background for the History of American Jewry," *The American Jew: A Reappraisal* , O.I. Janowsky, ed. (Philadelphia: The Jewish Publication Society of America 1964), pp , 11-25, at pp. 19-23.

[391] Bernard D. Weinryb, "Jewish Immigration and Accommodation to America,", *The Jews: Social Patterns of an American Group*, M. Sklare, ed. (Glencoe, IL: The Free Press 1958) pp. 4-23, at p. 23

[392] Hutchinson, *Religious Pluralism in America*, p. 198.

Catholic-Jew in the United States. Increasingly, public emphasis was placed upon the nation's "Judeo-Christian heritage."[393]

Previously abandoned in the American struggle for survival and the heated competition for commercial success, U.S. Jews increasingly chose to honor the Sabbath as a necessary cessation of temporal concerns and counter-cultural protest for genuine devotion to God.[394] Sabbath observance, long a defining practice of Judaism, Sabbath practice had been increasingly forgotten. The previous generation of American Jews had been forced to work a six-day workweek, including Saturdays, in order to support their families. Now, America's Jews showed vibrant interest in their religious traditions and a renewed adherence to their faith practices. Recently inspired by Holocaust revelations and Orthodox immigrant piety, Jews in the United States once again flocked to *Shabbat* services. Conservative and Liberal, Orthodox and Reform, Jews of all persuasions expressed a renewed commitment to personal Sabbath observance and communal Saturday worship.[395]

Unfortunately, the Jews' Sabbath revitalization was destined to create friction with a renewed American Christian emphasis on preserving Sunday as the common day of rest. As more Jews closed their businesses from Friday sunset to Saturday nightfall, Sunday business revenues took on greater importance. While Christian shoppers took advantage of increased shopping opportunities, traditionalist ministers warned against disregard for

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[393] Will Herberg, *Protestant-Catholic-Jew: An Essay in American Religious Sociology* (Garden City, N.J.: Doubleday 1955); *cited in* Hutchinson, *Religious Pluralism in America*, p. 201-203 and Sarna, *American Judaism*, p. 275. Note that the term "Judeo-Christian" is a term which was coined by the American Protestant mainstream and may be offensive to Jews.
[394] *See* Plaut, p. 177.
[395] Sarna, *American Judaism*, pp. 162, 277-278, 284-285, 325-326 *and* Ringwald, p. 161.

the Lord's Day. At the same time retailers, their employees, labor unions, and factory workers fought for stricter enforcement of local Sunday closing laws.[396]

C. Upholding Public Morality through Sunday Closing Laws

Blue laws became a national issue in the century after the Civil War. Sunday closing legislation had been enacted against a backdrop of Protestant elite political power and state control. Christian Sabbath restrictions continued to be considered necessary to encourage Sunday worship and uphold public morality. Over time, these regulations became embedded in the texture of American life and the common day of rest became a secular custom. Yet, Orthodox Jews and Sabbatarians, including Seven Day Baptists and Adventists, remained vocal in their opposition to these biased codes. For both Conservative Christians and Sabbatarians, Sunday closing laws amounted to a substantive issue pitting of Christian practice against a common day of rest which violated religious liberties as well as the biblical mandates of a seventh-day Sabbath. Soon, the matter took on a deeper, symbolic importance when issues involving substantive liberties and procedural concerns over fair representation arose.[397]

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[396] Alan Raucher, "Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview," *Journal of Church and State*, Vol. 36, (Buffalo, N.Y.: William S. Hen & Co., Inc. 1994), pp. 13-33, at pp. 24-25; Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* , Vol. 1(Princeton, NJ: Princeton University Press 2006), pp.184-185; Milton R. Konvitz, "Inter-Group Relations," *The American Jew: A Reappraisal* , O.I. Janowsky, ed. (Philadelphia: The Jewish Publication Society of America 1964), pp. 75-99, at pp. 84-85.

[397] Peter Wallenstein, *Blue Laws and Black Codes: Conflict, Courts, and Change in the Twentieth Century* (Charlottesville, VA: University of Virginia Press 2004), pp. 3, 8-10, 13-14, 39. In the early twentieth century, the Lord's Day Alliance attempted to pressure for government-imposed morality. Its general secretary, Rev. Harry L. Bowlby,, focused his attacks on Jews proclaiming "A Jew must respect the American Sunday. This is a Christian country." The Alliance's campaign for stricter Sunday closing regulations met defeats in several states in 1921. Raucher, "Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview," at pp. 22-23 *citing quotes from* Elsie McCormick, "Watch-Dog of the Blue Laws, *American Mercury* Vol. 14 (May 1928), pp. 91-98.

On the Federal level, the U.S. Congress had enacted the Postal Act of 1810 requiring Sunday mail delivery. This act ignited the Sabbatarian movement, which ultimately persuaded Congress to place a Sunday closing condition on their funding of the 1893 World's Fair.[398] The World's Fair directors promptly returned Congress's money, resolving to remain open on the first day of the week. Although the U.S. Attorney General quickly prosecuted the Fair's blue law breach, he lost the case. Subsequently, he decided not to appeal the matter when it became apparent that it could not be heard before the event's closing.[399]

On the local front, state legislatures continued to exercise their police powers by enacting Sunday closing acts. Activities as diverse as baseball and commodity sales were prohibited on Sundays. When the U.S. Supreme Court was first faced with appeal of a Sunday closing conviction, the Justices refused to interfere with local blue laws. Rather, they cited the right of state government to "protect all persons from the physical and moral debasement which comes from uninterrupted labor."[400]

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[398] Alan Raucher, "Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview," *Journal of Church and State*, Vol. 36, (Buffalo, N.Y.: William S. Hen & Co., Inc. 1994), pp. 13-33, at pp. 14,and 20.

[399]Peter Wallenstein, *Blue Laws and Black Codes*, (Charlottesville : University of Virginia Press 2004) p. 38. *See also* Roy Z. Chamlee, Jr., "The Sabbath Crusade: 1810-1920," (Ph.D. diss., George Washington University 1968); pp. 261-286 cited in Raucher, p.15. *and* Warren L. Johns, *Dateline Sunday, U.S.A.: The Story of Three and a Half Centuries of Sunday-law Battles in America* (Mountain View, CA: Pacific Press Publishing Association 1967), pp. 73-76. Raucher, p. 20.

[400]*Soong v. Crowley*, 113 U.S. 703, 5 S. Ct. 730, 28 L. Ed. 1145 (1884). In writing the opinion of the U.S. Supreme Court, Associate Justice Stephen J. Field upheld San Francisco's 1883 Sunday and night laundry closing ordinance by dismissing Appellant Soo Hing's suit for wrongful arrest and unfair treatment of the Chinese. Justice Field insisted that the ordinance applied to any person who, like Soo Hing, engaged in the prohibited activity of operating a wash-house business both on a Sunday and after 10:00 p.m. In dictum, Justice Field went on to declare that blue laws provide necessary protection for labor. This argument persists to this day as the secular purpose for Sunday Closing Laws, allowing Courts to uphold blue laws while avoiding separation of church and state objections. Raucher, "Sunday Business and the Decline of Sunday Closing Laws," pp. 18-19 citing Charles R. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," *Journal of American History*, Vol. 61(March 1975), pp. 970-1005 which speaks of Justice Field's willingness to uphold governmental interference to uphold health, safety, and morals. *See* Johns, *Dateline*

Police enforced the blue laws when complaints arose. However, lack of public observance and uneven enforcement remained the rule.[401] Slowly, legal exceptions began to be enacted for gasoline sales, prescription pharmacies, and eventually entertainment. Religious exemptions were made in some states but remained rare.[402]

By the period between the two World Wars, Sunday closing laws had begun to fade into obscurity. The growing acceptance of a 40-hour work week and the increasing preoccupation with industrial production made the issue moot. [403] First the New Deal and then, the Allied War effort united all workers in the manufacture of American goods. Jews and other Sabbatarians were now able to work regular hours as well as worship on Saturday. The blue laws remained upon the books, but the public was concerned with other matters. Local officials were rarely called upon to enforce the Sunday closing regulations during the Second World War.

After W.W. II, multiple pressures once again defined Sabbath observance as the chafing point between Jews religious duty and American citizenship. Between 1945 and 1965, Jews began an unprecedented synagogue building campaign as they left the cities in droves and moved into the suburbs. Fueled by growing knowledge of the Holocaust

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Sunday, U.S.A., pp. 93-94 and David N. Laband and Deborah Hendry Heinbuch, *Blue Law: The History, Economics, and Politics of Sunday-Closing Laws* (Lexington, MA: D.C. Heath and Company 1987), p. 39.

[401] Michael R. Belknap, "God and the Warren Court: The Quest for 'A Wholesome Neutrality'," *The Supreme Court in American Society: Equal Justice Under Law* (New York: Garland Publishing, Inc. 2000), pp. 401-457, at p. 413. Laband and Heinbuch, *Blue Laws*, p. 136. Observing in 1886 that even church members had begun to buy Sunday newspapers, Henry M. Brooks opined that "the only way to have Sunday properly observed is for those who are influential to make some little personal sacrifices, if need be, to attend the Sunday services, and do all they can to promote the most cheerful views of religion and make the services interesting." Another magazine writer indicated in 1894, "Fishing on Sunday is prohibited by penal statute in the State of New York. It is thus a crime, but most people do not consider it immoral and many disregard the law without the slightest compunction." *Both men quoted in* Jeffrey Smith, "Sunday Newspapers and Lived Traditions in Late Nineteenth Century America," *Journal of Church and State*, Vol. 48, Iss. 1 (Winter 2006), pp. 127-152, p. 133.

[402] Michael R. Belknap, "God and the Warren Court," p. 413; Stephen M. Feldman "Religious Minorities and the First Amendment: The History, The Doctrine, and the Future," 6 U. Pa. J. Const. L. 222 (2003), at 253-254; Raucher, *Sunday Business and the Decline of Sunday Closing Laws*, pp. 21-22.

[403] *See* Ringwald, *A Day Apart*, p. 162.

and Orthodox immigrant influence, Jewish education and theology thrived.[404] At the same time, the increasing secularization and commercialization of American life renewed legal efforts to enforce Sunday closing regulations. Consumer demand for the convenience of Sunday shopping was fueled by the personal mobility achieved through car ownership, entry of women into the workforce, and the materialism of suburban life. Malls and chain stores clamored to compete for Sunday shoppers. Traditionalist Christian ministers joined forces with urban retailers to support local blue laws in an effort to encourage worship and thus, prevent shoppers from patronizing suburban malls open for Sunday business.[405] If capitalist concerns had resurrected Sunday closing laws from increasing obscurity, Jewish revitalization made these secular regulations a First Amendment issue.

The stage had been set for both an internal struggle over Jewish communal membership and legal conflict concerning American Sabbath norms. Debates mounted among Jews, Sabbatarians, big business owners, customers, and civil libertarians seeking to eliminate Sunday closings versus Christians, traditionalists, small retailers, and workers who sought Sunday protectionism. Each group attempted to take the high road, with the first group advocating for separation of church and state. The second alliance championed religious piety and family values. However, the squabble often declined into charges of religious fanaticism versus accusations of materialist greed.[406]

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[404] Ringwald, *A Day Apart*, p. 163.

[405] Raucher, p. 26. *See also* Konvitz, "Inter-Group Relations," p. 84-85. Both Raucher and Konivitz indicate that these vigorous campaigns for new and more stringent blue laws were supported by an alliance of labor unions, retail businessmen, and church leaders, especially the Protestant group, Lord's Day Alliance, and the Roman Catholic Church.

[406] Raucher, p. 24-25; American Jewish Committee and the Jewish Publication Society, *American Jewish Year Book* , Vol. 62 (New York: American Book-Stratford Press, Inc. 1961), pp. 35-37, 98-100; Ringwald, pp. 161-164.

D. Blue Law Challenges

Vigorous blue law enactment campaigns were launched by small commercial and union labor interests as protectionist measures against ruthless big-business competitors.[407] Christian majorities eagerly lent their support to this symbolic cause, advocating blue laws in aid of religious devotion and traditional American values. Soon liberal Catholics joined fundamentalist Protestants committed to Sunday business closings and a common day of rest.[408] Yet, *Newsweek* and *The Washington Post* stated the obvious fact that many of the same church goers who filled Sunday services willingly patronized Sunday retailers.[409] Years before, *Business Week* had joined *Newsweek* to predict that strict, consistent enforcement of blue laws would only serve to inconvenience the majority of citizens and cause public demand for their repeal.[410]

Nevertheless, persuaded by outspoken public campaigns for stricter blue laws, forty-one of forty-four states with comprehensive Sunday restrictions responded by

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[407] Raucher p. 24-25; Konivitiz, p. 84.

[408] Raucher, pp. 26; Konivitz, p. 89. *See* Pope John XXIII, *Mater et Magistra* (May 15, 1961). While the Roman Catholic Church historically considered the Sabbath obligation as a part of the Jewish "ceremonial law" which had been abrogated and ceased obligatory import upon the death of Jesus Christ, this encyclical letter issued by Pope John XXIII contained strong statements supporting Sunday observance. The Pope's encyclical reinforced the traditional Church stance that Christian tradition made Sunday a day of worship and rest on which Mass attendance was required. Servile work had long been viewed as forbidden by the Catholic Church, but in the interests of Christian ecumenicism, the Pope's encyclical urged Catholics' cessation of the liberal and common work long permitted by the Church if essential.

[409] "On The Seventh Day?" Newsweek, Vo. 51 (21 April 1958), p. 72 cited in Raucher, p. 24, ftn. 34; The Washington Post specifically cited the drastic change in social patterns as strong evidence that more stringent Sunday laws constituted the wrong remedy, Instead, the newspaper urged church groups "to appeal for observance of a Sunday ban among their own members" and merchants to "seek agreement through their trade associations" for voluntary closing. The editorial concluded, "After all, law or no law, no one is compelled to shop on Sunday." Editorial, *The Washington Post* (February 13, 1960) *cited in* ____, "Church-State Issues: Sunday Closing Laws," *American Jewish Yearbook*, Vol. 62 (Philadelphia: The Jewish Publication Society of America 1961), p. 100.

[410] "Blue Laws," *Newsweek* Vol. 10 (20 December 1937); "Blue Sunday," *Newsweek* Vol. 17 (10 March 1941), pp. 19-20; "Sunday Work Laws," *Business Week* (22 November 1941);, p. 56; "Sunday Overtime?" *Business Week* (7 February 1942), p. 76. *See citation in* Raucher, p. 24, ftn. 33.

strengthening their regulations during the 1950's.[411] At the same time, Jews and Sabbatarians were not uniformly successful in lobbying for exemptions from the Sunday closing laws. Only twenty-two states granted permission for those who religiously refrained from work on Saturday to instead work on Sunday.[412] Yet many of these states refused to extend exemptions to retail merchants. Several states with large Jewish populations, including New York, Massachusetts, Maryland, and Pennsylvania, denied any relief.[413] These northeastern and mid-Atlantic States proved to be the battleground for blue laws. Emboldened by their active advocacy of civil rights and their growing sense of ethnic identity, Orthodox Jews and Sabbatarians joined with civil libertarians to raise constitutional objections to Sunday closing legislation on the basis of their religious liberty and minority rights.

The legal challenge of the Sunday Closing Laws had begun at the turn of the decade, when, in 1950, New York City police arrested two Orthodox Jews for operating their kosher meat market on Sunday. Although convicted by the municipal court, the butchers appealed to the New York Court of Appeals who refused to overturn the lower court's decision. Instead, the state appellate court insisted that the butcher's hardship and their customers' inconvenience were considerations to be weighed by the legislature and not the courts.[414] Exasperated, the butchers' attorney, Leo Pfeffer, appealed to the U.S. Supreme Court on grounds that lack of statutory exemptions for Sabbath observers was a constitutional violation of both the establishment and free exercise clauses. However, the

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[411] Sister Candida Lund, "The Sunday Closing Cases," *The Third Branch of Government: 8 Cases in Constitutional Politics* , C. H. Pritchett & Alan F. Westin, eds. (New York : Harcourt, Brace & World 1963), p. 277. cited in Belknap, *God and the Warren Court* , p. 13, ftn. 93. *See also* Konvitz, p. 84

[412] Lund, "The Sunday Closing Cases, p. 277 cited in Belknap, *God and the Warren Court*, p. 13, ftn. 96. *See also* Greenawalt, p. 184.

[413] Lund, "The Sunday Closing Cases, p. 277. cited in Belknap, *God and the Warren Court*, p. 13,ftns. 98 & 99. *See also* Konvitz, pp. 84-85.

[414] *People v. Friedman*, 302 N.Y. 75 (1950). *See* Raucher, p. 27.

U.S. Supreme Court dismissed the appeal for "want of a substantial federal question" in what was soon regarded as authoritative legal precedent.[415]

Like *Newsweek* and *Business Week* before him, Attorney Pfeffer concluded that only consistent, strict enforcement of the blue laws would motivate their appeal.[416] Still, New York's Sunday closing laws remained a morass of ambiguous regulations and inconsistent enforcement. This was the situation despite a 1952 amendment granting local governments the power to make certain provisions for religious Sabbatarians.[417] Although the 1958 Asch-Rosenblatt Bill proposed a religious exemption for New York City's Sabbatarian merchants, it was soundly defeated at the urging of the Catholic weekly periodical, *America*.[418]

It was then that four cases raising challenges to the blue laws began to make their way to the United States Supreme Court. The first, *McGowan v. Maryland,* and third, *Two Guys from Harrison-Allentown, Inc. v. McGinley*, involved secular appellants who admittedly operated seven days a week in violation of the law in Springfield, Massachusetts and in LeHigh County, Pennsylvania, respectively.[419] The second case, *Gallagher v. Crown Kosher Super Market*, and fourth case, *Braunfeld v. Brown*, each involved Orthodox Jewish challengers who claimed adversity as a result of Sunday closing regulations. While patrons of Crown Kosher argued that the Massachusetts statute

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[415] *People v. Friedman*, 341 U.S. 907 (1951).
[416] Leo Pfeffer, *Church State, and Freedom* (Boston: Beacon Press 1953), p. 234 *cited in* Raucher, p. 27, ftn. 41.
[417] Pfeffer . 236 *cited in* Raucher, p. 27-28, ftn. 42
[418] S. 5673, 181st Leg., Jan. Sess. (N.Y. 1958) (Rosenblatt Verson); A. 533, 181st Leg., Jan Sess. (N.Y. 1958) (Asch version); Belknap, p. 414, ftn. 100-101; Raucher, p. 28, at fnt. 43. According to Raucher, one-half of Protestant legislators and the majority of Catholics voted against this "fair Sabbath bill."
[419] *McGovern v. State of Maryland*, 220 Md. 117 (1959) and *Two Guys from Harrison v. McGinley*, 179 F. Supp. 944 (1959). *See* Arthur Littleton, Esq. and W. James MacIntosh, Esq. "Memorandum in Support of Jurisdiction and Consolidation," filed on behalf of Pennsylvania Retailers' Association , Intervening Defendant in Braunfeld v. Gibbons, reprinted **in** *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional* Law, P.B. Kurland & G. Casper, eds., Vol. 55(Arlington, VA: University Publications of America, Inc. 1975), p. 849-850; Raucher, pp. 28-29.

effectively deprived them of the opportunity to purchase kosher food on Sunday, only the *Braunfeld Case* involved individual Orthodox Jewish retailers whose Sunday operations were sanctioned under Pennsylvania law.[420]

The U.S. Supreme Court accepted jurisdiction of all four cases, scheduling appellate argument for its October 1960 Term.[421] In each case, the Appellants claimed violation of their First Amendment rights. *McGowan v. Maryland* was an appeal brought by seven employees of a discount department store who were convicted of Sunday sales under the Maryland blue law.[422] Grounds for appeal included the Appellants' allegations that the Maryland Sunday Closing Law's were unconstitutionally vague and made arbitrary exemptions for the Sunday sale of certain commodities by some retailers in specific locations. Their main claims were for breach of their rights to equal protection and due process under the Fourteenth Amendment.[423] In addition, the Appellants also claimed that the Maryland Act violated their federal First Amendment rights to religious free exercise and against the government's establishment of religion as applicable to the States through the guarantees of the Fourteenth Amendment.[424]

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[420] *Gallagher v. Crown Kosher Super Market*, 176 F. Supp 466 (1959), *Braunfeld v. Gibbons*, 184 F. Supp. 352 (1959). *See* Arthur Littleton, Esq. and W. James MacIntosh, Esq. "Memorandum in Support of Jurisdiction and Consolidation," filed on behalf of Pennsylvania Retailers' Association , Intervening Defendant in Braunfeld v. Gibbons, reprinted in *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional* Law, P.B. Kurland & G. Casper, eds., Vol. 55 (Arlington, VA: University Publications of America, Inc. 1975), p. 849-850; Raucher, pp. 28-29.

[421] ____, "Church-State Issues: Sunday Closing Laws," *American Jewish Yearbook*, Vol. 62 (Philadelphia: The Jewish Publication Society of America 1961), p. 98.

[422] *McGowan v. State of Maryland* , 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

[423] *McGowan v. State of Maryland*, 366 U.S. 420, 425-429; 81 S. Ct. 1101, at 1104-1107; 6 L. Ed. 2d 393 (1961). *See* Md. Ann. Code, Art. 27 Sec. 492-534 C; Art. 2B, Sec. 28(a); Ar.66C, Sec. 132(d), 698(d) (1957).

[424] McGowan v. State of Maryland, 366 U.S. 420, 429-431; 81 S. Ct. 1101, at 1107-1108; 6 L. Ed. 2d 393 (1961). *See* Md. Ann. Code, Art. 27 Sec. 492-534 C; Art. 2B, Sec. 28(a); Ar.66C, Sec. 132(d), 698(d) (1957). *See* Chapter 1, p. 16, ftn. 31 & p. 24, ftn. 51 for further information regarding the "incorporation doctrine."

Two Guys from Harrison- Allentown, Inc. v. McGinley involved a suit brought by another discount house to enjoin continuing enforcement of the Pennsylvania blue law made at a competitor's behest against its Sunday sales staff.[425] The first basis for their complaint was that the Pennsylvania Sunday closing laws violated their Fourteenth Amendment equal protection and due process rights. They argued that the law was a form of selective enforcement, since it prohibited Sunday sale of only twenty specific commodities and solely by retailers (allowing sales by wholesalers, service dealers, or factories).[426] Second, the *Two Guys* Appellants alleged a violation of their federal First Amendment right against Pennsylvania's establishment of religion enforceable under the incorporation doctrine.[427]

In *Gallagher v. Crown Kosher Super Market,* a grocery store owner enjoined the prosecution of his partner under the Massachusetts blue law after competing kosher butchers urged the police to arrest him.[428] A three-judge panel of the Federal District Court ruled that the Massachusetts Sunday closing law was unconstitutional as to Saturday observers. The Federal District Judges had found that the Massachusetts blue law schema presented an "unbelievable hodgepodge" of regulations that violated the retailers' Fourteenth Amendment equal protection and due process rights.[429] Further, the Federal District Court concluded that Massachusetts' Sunday closing statutes had violated Appellants' First Amendment nonestablishment and free exercise rights, as

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[425] *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961). 18 Purdon's Pa. Stat. Ann. (1960 Cum. Supp.) Secs. 4699.4 and 4699.10.
[426] *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, at 589-591; 81 S.Ct. 1135, at 1139-1140 (1961).). *See* Chapter 1, p. 16, ftn. 31 for further information regarding the "incorporation doctrine."
[427] *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. at 592 ; 81 S.Ct. at 1140 (1961).
[428] *Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961). Mass. Gen. Laws Ann. chap. 136, Secs. 5 and 6 (1960).
[429] *Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617, at 622, ftn. 2; 81 S.Ct. 1122, at 1125, ftn. 2 (1961).

applicable to Massachusetts under the Fourteenth Amendment. In fact, the lower federal court had found that "Massachusetts had no legitimate secular interest in maintaining Sunday closing."[430]

Finally, *Braunfeld v. Brown* was an action originally brought by Orthodox Jewish merchants in Philadelphia seeking a permanent injunction to protect them against enforcement of Pennsylvania's Sunday Closing Law. Despite the lack of an exemption for Sabbatarians in the Pennsylvania statute, the federal district court initially dismissed their cause. Appellants amended their complaint to contend that enforcement of the Pennsylvania statute would violate their First Amendment rights of non-establishment, free religious exercise, and equal protection under the incorporaton doctrine.[431] Specifically, these merchants claimed that Pennsylvania's enforcement of this blue law would result in substantial economic loss that not only benefited their non-Sabbatarian competitors, but compelled them to choose between forgoing their own Sabbath observance or incurring serious economic disadvantage. [432]

In the end, the Supreme Court reached the same conclusion in all four cases, choosing not to overturn any of the blue laws. Our purpose in reviewing the Supreme Court's treatment of Orthodox Jewish concerns is to carefully observe the Court's considerations, investigate relevant factors, analyze the bases for their decision, and evaluate the holding's impact upon American Jewish citizenship. In order to effectively accomplish this, only one case will be subjected to our close scrutiny. Due to the direct statutory

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[430] *Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617, at 624, 630; 81 S.Ct. 1122, at 1126, 1129 (1961).
[431] *See* Chap.1, p.16, ftn.31 and p.24, ftn. 55 for further information regarding the "incorporation doctrine."
[432] *Braunfeld v. Gibbons*, 366 U.S. 599, at 599-600 and 609-610, 81 S. Ct. 1144, at 1144-1145 and 1149, 6 L. Ed. 2d 563; 1961 U.S. LEXIS 1059 (1961). *See* 18 Purdon's Pa. Stat. Ann. (1960 Cum. Supp.) Sec. 4699.10 (1959).

challenge to the Jewish Sabbath and resulting rebuff of Jewish communal duty, this study will focus on the Supreme Court's *Braunfeld* decision and its implications for American Judaism.

E. *Braunfeld v. Brown* (1961)

Since its inception, Philadelphia has welcomed religious refugees of all stripes. At the turn of the twentieth century, the "city of brotherly love" offered Russian Orthodox Jews initial employment predominantly in the garment industry. After W.W. II, a substantial number of these earlier Jewish refugees had worked their way up to establish their own retail and manufacturing businesses, choosing to remain in the southern section of the city.[433] By the early 1960's, Philadelphia was reported to have retained a mid-size Jewish community of roughly 331,000 people.[434]

At least five Orthodox merchants among their number struggled to maintain the Jewish Sabbath and remain economically competitive. Abraham Braunfeld was the owner and operator of a retail store located at 327 South Street which sold adult clothing and children's apparel. Isaac Friedman sold draperies and slip-covers at his store-front on South 4th Street. His commercial neighbor, Alter Diament sold home furnishings from his shop down the street. Two relatives, S. David Friedman and Joseph R. Friedman owned and operated a shoe store at 2247 E. Williams Street. Firmly believing that their religious observance was protected under the U.S. Constitution, these Jewish retailers closed their businesses from sundown on Friday through sundown on Saturday in observance of

[433] Charles S. Bernheimer, *The Russian Jew in the United States: Studies of Social Conditions in New York, Philadelphia, and Chicago, with Description of Rural Settlements* (Philadelphia: The John C. Winston Co. 1905), p. 5 and 133.
[434] Benjamin R. Epstein and Arnold Forster, *"Some of My Best Friends…"* (New York: Farrar, Straus and Cudahy 1962), p. 103.

Shabbat. Their resulting loss of revenue required that they attempt to recoup sales profits. Defying Pennsylvania's Sunday Closing Law, each independently chose to open his shop on Sundays and enjoyed steady business from Jewish and Gentile shoppers alike.

To their surprise, Philadelphia police arrested them for violation of Pennsylvania Statute Sec. 4699.10 (1959). In part, the law read:

> Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, housewares, home, business or office appliances, hardware, tools, points, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred ($200) or undergo imprisonment not exceeding thirty days in default thereof.
>
> Each separate sale or offer to sell shall constitute a separate offense …"[435]

While all five Appellants asserted that their ability to earn a livelihood would be seriously impaired by the Sunday closing of their shops, only Braunfeld claimed that he would be forced out of business if Pennsylvania's statute was enforced against him.[436]

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[435] 18 Purdon's Pa. Stat. Ann Sec. 4699.10. (1960 Com. Supp.), *See Braunfeld v. Gibbons*, 366 U.S. 599, at 599, ftn. 1; 81 S. Ct. 1144, at 1144, ftn. 1 and 1149, 6 L. Ed. 2d 563; 1961 U.S. LEXIS 1059 (1961).
[436] *Braunfeld v. Gibbons*, 184 F. Supp. 352 (Pa. E. Dis. 1959). *See* Stephen B. Narin, Esq., Marvin Garfinkel, Esq., and Theodore R. Mann, Esq., "Jurisdictional Statement," filed on behalf of Appellants, reprinted in *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional*

The Arrestees brought suit seeking a permanent injunction restraining enforcement of the Pennsylvania Act. Although the State court initially issued a temporary restraining order, they ultimately granted the Philadelphia Police Commissioner Gibbons and District Attorney Blanc's motion, dismissing their Complaint and dissolving the restraining order. Undaunted, the Jewish merchants sought permission to amend their petition. The Amended Complaint alleged that the merchants' U.S. Constitutional rights had been violated and again sought a permanent injunction. The state's three-judge panel dismissed their second complaint finding that the case came within the legal ruling in *Two Guys From Harrison, Inc. v. McGinley*, 170 F. Supp 944 (1959).[437]

Noting that unlike the Appellants in the *Two Guys Case* they were Sabbath-observing Jews, the five Orthodox retailers petitioned the U.S. Supreme Court for review of their Constitutional claims as a "matter of great public importance." The U.S. Supreme Court agreed, noting probable jurisdiction and setting the case for oral argument together with the three other cases described above.[438]

In their Appellate Brief, the attorneys for the Orthodox-Jewish retailers argued that Philadelphia's enforcement of the Pennsylvania blue law violated three different sets of constitutional rights: (1) religious free exercise; (2) government non-establishment of religion; and (3) equal protection and due process.[439] They asserted that the Fourteenth

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Law, P.B. Kurland & G. Casper, eds., Vol. 55 (Arlington, VA: University Publications of America, Inc. 1975), p. 842.

[437] *Braunfeld v. Gibbons*, 184 F. Supp. 352 (Pa. E. Dis. 1959). *See* Jewish Year Book, Vol. 62, (1963), pp. 98-99.

[438] *Braunfeld v. Gibbons*, 362 U.S. 987; 80 S. Ct. 1078; 4 L. Ed. 2d 1020 (1960).

[439] *See* Narin, Garfinkel, and Mann., "Appellant's Brief," *Landmark Briefs*., Vol. 55, pp. 863-864.

Amendment required that all three federal guarantees be applied to protect them as American citizens against state law's infringement of their First Amendment rights.[440]

Specifically, the Appellants insisted that they were observant, Orthodox Jews who had always abstained from work in strict observance of the Saturday Sabbath, as required under the Torah and the central tenets of Judaism.[441] Because the Pennsylvania Act contained no religious exemption, its enforcement required them either to give up their faith and open for business on Saturdays or suffer the substantial economic hardship of operating on the least remunerative remaining weekdays. By enforcing such a decision, the State of Pennsylvania not only compromised Sabbatarian merchants' free exercise of their faith through economic compulsion, but established the majority's Christian religion through statutory dictate of uniform Sunday rest. In addition to violating the First Amendment, the statute itself was arbitrarily selective. It only precluded certain commodities and businesses from operating on Sunday. This breached both the equal protection and due process guarantees under the Fourteenth Amendment.[442]

Twice, the Appellate Brief cited *Pierce v. Society of Sisters* in their defense. First, it was asserted that in *Pierce* the Court had struck down legislative attempts to artificially unify citizens by setting unconstitutional standards of conformity, such as compelling every child to attend public school.[443] Even "national security" had not provided a sufficient basis for the court to uphold statutes attempting to impose "national unity"

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[440] *See* Narin, Garfinkel, and Mann., "Appellant's Brief," *Landmark Briefs*., Vol. 55, pp. 863-864. As oral argument proved, this was a gutsy argument in that at the time there was internal debate among the U.S. Supreme Court Justices concerning whether the First Amendment could be applied to the States through the Fourteenth Amendment. *See* "*Braunfeld v. Brown* Oral Argument," *Landmark Briefs*., Vol. 55, p. 1028.
[441] Narin, Garfinkel, and Mann., "Appellant's Brief," *Landmark Briefs*., Vol. 55, pp. 865.
[442] Narin, Garfinkel, and Mann., "Appellant's Brief," *Landmark Briefs*, Vol. 55, pp. 867-869, 901.
[443] *Pierce v. Society of Sisters* , 268 U.S. 510; 45 S. Ct. 571; 69 L. Ed. 1070 (1925) cited in Narin, Garfinkel, and Mann., "Appellant's Brief," *Landmark Briefs*, Vol. 55**,** p. 869

through such requirements as flag salutes in the classroom.[444] Again citing the *Pierce* decision, the Appellates argued against State mandated standardization of business hours. They went on to assert that the court must apply special scrutiny in reviewing state legislation that attempted to impose "cultural unification" upon "particular religious, racial or national minorities or affecting discrete insular minorities."[445]

Responding, the Government's attorneys denied all assertions of constitutional violation. Instead, they insisted that the Pennsylvania Statute did not infringe upon federal constitutional rights. First, the Act did not interfere with Sabbatarian religious practices, for it did not inhibit Saturday worship. Rather, it simply imposed a uniform day of rest on Sunday. Appellants' religion did not require them to do business on Sunday and their choice to do so was strictly economic. The effect of conditioning enforcement of the Pennsylvania statute upon each person's articles of faith would be to make observance of the civil law "subservient to observance of the canonical; the protection of the First and Fourteenth Amendments does not reach so far."[446] Second, they maintained that the current Pennsylvania Act was a purely secular law, despite its admittedly Christian past. The present Statute did not establish religion but merely sanctioned the popularly accepted common day of rest. Not only did the Statute fail to make any religious references, it enforced the rest day uniformly accepted and commonly used. In this way, the statute insured "the least inconvenience to the overwhelming majority of citizens."[447] Arguing that the legislature acted reasonably, Appellees asserted that the quality of legislative decision-making and alternative methods of enactment were not the

[444] Narin, Garfinkel, and Mann., "Appellant's Brief," *Landmark Briefs*, Vol. 55, p. 869 citing *State of Virginia Board of Education, et. al. v. Barnette,* 319 U.S. 624; 63 S. Ct. 1178; 87 L. Ed. 1628 (1943).
[445] Narin, Garfinkel, and Mann., "Appellant's Brief," *Landmark Briefs*, Vol. 55, p. 891.
[446] Berger and Ruben., "Brief for Appellees," *Landmark Briefs*., Vol. 55, pp. 912.
[447]Ibid. pp. 918.

subject of judicial review.[448] Finally, Appellants' equal protection and due process arguments had been squarely addressed and dismissed by the lower court. In Pennsylvania, Judge Hasties had found that the statute in question was not "arbitrarily selective." Rather, it met the requirements of both equal protection and due process by covering the very categories of merchandise and retailing that created the flood of recent Sunday closing violations. In addition, the law greatly increased the fine imposed in order to effectively deter the crime.[449] Based upon these arguments, Appellees requested that the U.S. Supreme Court affirm the Pennsylvania Court's dismissal of the complaint.[450]

Amicus briefs were filed on behalf of both sets of parties. Supporting the Appellant, *amici* were filed by the East Pennsylvania Conference of Seventh Day Adventists, the Rabbinical Association of Philadelphia, the Philadelphia Board of Rabbis, and the Jewish Community Relations Council of Philadelphia ("representing thirty-one Jewish communal organizations"). These organizations vigorously supported the Appellants' free exercise and establishment claims. Each religious organization confirmed that Pennsylvania's law not only interfered with Sabbatarian worship, but favored the Christian Sunday over the Biblical Sabbath of the seventh-day. Eschewing their past strategy of downplaying Jewish distinctiveness and emphasizing their rights as American citizens, the SCA (Synagogue Council of America) and NCRAC (National Community Relations Advisory Council) brief explained the distinctive Sabbath practices of Orthodox Judaism. Yet, the next paragraph of their brief based their claims on separation of church and state.

[448] Ibid., pp. 919.
[449] Ibid., pp. 919-920
[450] Ibid., pp. 921.

While they made necessary reference to free exercise rights, Jewish supporters were careful to also ground their claims upon the Establishment Clause.[451] The Jewish tactic of presenting themselves as "just like other Americans" had proven more successful before the predominantly Protestant bench of the U.S. Supreme Court.[452] In response, the Pennsylvania Retailers' Association, National Retail Merchants Association, and Retail Clerks International Association, and AFL-CIO all filed *amicus curiae* in favor of the Appellees. These commercial interests intervened to assert the need for a common day of rest and the legitimacy of Pennsylvania's law establishing a secular weekly respite.[453]

At oral argument, several key points were made. Attorney Mann, representing the Appellants, reminded the Justices that because Jews constituted such an insignificant number compared to Christians in Pennsylvania, "it may not appear to the Christians that a blue law is religious because nobody raises issues."[454] One Justice asked Mann whether a similar law would deprive a Muslim of due process or equal protection. Mann uncomfortably responded: "The law does not forbid him – it does technically – it does, I should say practically."[455] Later, Mann asserted that "it falls to these very small sects and sometimes unpopular sects to test the religious freedom in our land."[456]

As the Appellees took the podium, Attorney Berger deftly seized upon the Muslim hypothetical to assert that the Pennsylvania Statute did not directly inhibit anyone's faith practices nor establish any citizen's religion. Rather, whatever harm the Law might

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[451] Brief of Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae at 4, Braunfeld (No. 67) cited in Stephen M. Feldman, "Religious Minorities and the First Amendment: The History, The Doctrine, and The Future," 6 U. Pa. J. Const. L. 222 (2003), at p. 257, ftn. 158.
[452] Stephen M. Feldman, "Religious Minorities and the First Amendment: The History, The Doctrine, and The Future," 6 U. Pa. J. Const. L. 222 (2003), at. 246-247.
[453] *See* "Amicus Briefs," *Landmark Briefs*, Vol. 55, pp. 839, 903-1021.
[454] "*Braunfeld v. Brown* Oral Argument," *Landmark Briefs*., Vol. 55**,** p. 1035.
[455] Ibid.**,** p. 1035.
[456] Ibid., p. 1036.

cause, economic or otherwise, was "indirect, not immediate, consequential, and ... personal" to the individual and "not, on the other hand, direct, immediate, and universally applicable to all Mohammedans."[457] Again, Attorney Berger asserted that the five Orthodox Jewish retailers were "not in any way penalized" or prevented from attending Saturday worship. The retailers suffered economic impact because of their non-religious, occupational choices.[458]

Insisting that the Statute was secular, he defended it as a legitimate exercise of police power in protecting the health, safety and welfare of Pennsylvania's citizens. The law served economic and sociological purposes of supporting a uniform day of rest.[459] Berger concluded by quoting Circuit Judge Learned Hand's argument that the First Amendment protects against Government action, but bestows no right to insist that others conform to our own preferences and pursuits.[460]

Over five months later, the U.S. Supreme Court published their plurality decision. In *Braunfeld v. Brown*, as in the other three companion cases, the majority of justices found no constitutional violation. Rather, the majority ruled that all the subject blue laws were valid exercises of the States' police powers.[461]

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[457] Ibid., p. 1037. Note that the term "Mohammedan" used by the Justices and Attorneys at oral is extremely offensive to Muslims. This is because Muslims ascribe faith in Allah alone (not Mohammad), viewing Mohammad as the prophet or human messenger of Allah. The one and true God is Allah.
[458] Ibid., p. 1038, 1041-1042.
[459] *See* "*Braunfeld v. Brown* Oral Argument," ," *Landmark Briefs*, Vol. 55, p. 1040, 1044-1045.
[460] Ibid., p. 1045. Learned Hand's exact quotation was:

> The First Amendment protects one against action by the Government, though even then not in all circumstances. But it gives no one the right to insist, in the pursuit of their own interests, others must conform their own conduct to his own religious necessities. …
>
> We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life. Now, we can hope no reward for the sacrifices this may require beyond our satisfaction from within or our expectations for a better world.

[461] *Braunfeld v. Brown*, 366 U.S. 599, at 607-609, 81 S. Ct. 1144, at 1148-1149, 6 L. Ed. 2d 563 (1961). *See* 18 Purdon's Pa. Stat. Ann. (1950 Cum. Supp.) Sec. 4699.10 (1959).

Chief Justice Earl D. Warren wrote the majority opinions in all four cases. Using the *McGowan* case as his main vehicle to discuss Sunday closing legislation in relation to the Establishment Clause, the Chief Justice quickly disposed of the equal protection and due process arguments by deferring to legislative discretion, finding no evidence of unreasonable or arbitrary statutory categories nor invidious discrimination in any of the case records.

In the two matters involving secular retailers, the *Two Guys* Appellants were silent as to free exercise while the *McGowan* Appellants challenged the Maryland statute as violating their own personal religious exercise rights. In response, the U.S. Supreme Court Majority found the record silent as to the *McGowan* Appellants' personal religious beliefs and thus, alleged "only economic injury to themselves." Insisting that "a litigant may only assert his own constitutional rights or immunities," the Chief Justice recorded the majority's holding that the Appellants "had no standing to raise this [deprivation of the constitutional right to religious free exercise] contention."[462] Asserting that any blue law's interference with the Sunday shopping of *Crown Kosher Super Marke*t's Orthodox Jewish customers was an injury similar but not as grave as those to the observant retailers in *Braunfeld*, Chief Justice Warren decided to leave his analysis of Sunday closing laws in relation to free exercise rights for the writing of the *Braunfeld* decision.[463]

Turning their focus to *Braunfeld v. Brown*, the majority of justices found that the case raised only one issue not already resolved by their prior three decisions. The Justices decided to consider the *Braunfeld* Appellants' religious exercise claim because the

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[462] *McGowan v. State of Maryland*, 366 U.S. at 429, 81 S. Ct. at 1107l; *Two Guys from Harrison-Allentown, Inc. v. McGinley*,

[463] *Gallagher v. Crown Kosher Super Market, Inc*., 366 U.S. 617, at 631; 81 S.Ct. 1122, at 1126, 1129 (1961). *See Braunfeld v. Brown*, 366 U.S. 599, at 601-602 and 607; 81 S. Ct. 1144, at 1145 and 1148 (1961).

retailers asserted violation of their own personal religious rights. Chief Justice Warren again penned the majority opinion, in which Justices Black, Clark, and Whittaker concurred. Justices Frankfurt and Harlan joined the majority decision, but Frankfurt elected to write a separate opinion representing their distinct view.

Although all the Justices conceded both the religious heritage of Pennsylvania's statute and the economic cost of its' enforcement upon Appellants, the Majority again upheld a State Sunday Closing Law as a legitimate general act that exercised valid state police power. Insisting that the Pennsylvania statute pursued a secular goal that promoted public welfare, the court observed that it only indirectly burdened the Appellants' religious observance.[464] With reference to its traditional distinction between religious belief and practice, the Warren decision held that the State of Pennsylvania:

> "does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets."[465]

Rather, the State's Sunday law:

> "simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing the alternatives open to appellants and others similarly situation … may well result in some financial

[464] *Braunfeld v. Brown*, 366 U.S. 599, at 602-603; 81 S. Ct. 1144, at 1145-1146.
[465] *Braunfeld v. Brown*, 366 U.S. 599, at 603; 81 S. Ct. 1144, at 1146.

> sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful."[466]

The Court refused to strike down the legislation because it "imposes only an indirect burden."[467] While the Court did endorse religious exemption as the wisest solution to the problem, it refused to undermine the Pennsylvania Legislature's choice of methods and insisted that their judicial review was limited to federal constitutional evaluation.[468] The Majority remained consistent in finding no Constitutional violation. They ruled that the Pennsylvania Statute did not violate t he Free Exercise Clause, because it did not directly burden Jewish Sabbath practices.[469]

In their lengthy, multi-case concurrence, Frankfurter and Harlan agreed that the blue laws did not violate the Establishment Clause.[470] Yet, they objected to Chief Justice Warren's reliance upon the "wall of separation" rationale in Justice Black's *Everson* opinion. Instead, Frankfurter preferred to base his opinion upon his own lengthy rendition of blue law history. In it, he acknowledged the blue laws' religious origins, but insisted that secular legislative purposes were now predominant. Subtly, Frankfurter was registering his objection to Chief Justice Warren's refusal to basing his own opinion on Frankfurter's research.[471] Referencing the *Pierce* decision, Frankfurter distinguished the

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[466] *Braunfeld v. Brown*, 366 U.S. 599, at 605-606; 81 S. Ct. 1144, at 1147.
[467] *Braunfeld v. Browns*, 366 U.S. 599, at 606,;81 S. Ct. 1144, at 1147.
[468] *Braunfeld v .Brown*, 366 U.S. 599, at 603-608 and 609-610; 81 S. Ct. 1144, at 1145-1148; 6 L. Ed. 2d 563 (1961).
[469] *Braunfeld v .Brown*, 366 U.S. 599, at 605-606; 81 S. Ct. 1144, at 1147 (1961).
[470] Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460; 81 S. Ct. 1153 (1961).
[471] Belknap, "God and the Warren Court," p. 417. Interestingly, it is known that Chief Justice Warren originally intended to base the majority opinion upon their primarily secular rather than religious purpose. He only changed his mind to reflect at Justice Black's behest, indicating "the touchstone [of the decision to be] whether legislation does or does not aid religion." Quoting extensively from Justice Black's *Everson*

government's unconstitutional promotion of religion from legitimate state protection of individuals' religious free exercise rights. He insisted that "not every regulation … affronts the requirement of church-state separation."[472]

Despite his Jewish roots, the agnostic Frankfurter remained indifferent to the concerns of the Orthodox merchants. Rather, he agreed with the Warren majority that "a blanket Sunday ban applicable to observers of all faiths cannot be held unreasonable." Neither did he believe that a retailer's right to free exercise was violated by a burden whose extent "is not fixed by the legislative decree, beyond the power of the individual to alter."[473] Admitting that the Sunday closing statute put a "considerably greater" burden on Sabbatarian retailers in terms of additional labor and material sacrifice, Frankfurter reasoned that

> "the legislature may have concluded that its severity might be offset by the industry and commercial initiative of the individual merchant."[474]

"Inquiry into the hidden motives" of the legislature was "beyond the competency of the courts."[475] He further justified the burden upon the Sabbath observing retailers by

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decision, the Chief Justice had concluded that Sunday closing laws, like bus transport repayments for students, did not breach the "wall of separation." McGowan, 366 U.S. at 461. *See* Belknap, "God and the Warren Court," p. 417 *quoting language from* Felix Frankfurter, "Memorandum on Changes, " *Felix Frankfurter Papers* (March 9 and May 24 on reel 63, frames 604-605, Felix Frankfurter Papers, held in Harvard Law School Library, Cambridge, Mass.).

[472]Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460, at 467; 81 S. Ct. 1153, at 1157 (1961).

[473] Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460, at 521; 81 S. Ct. 1153, at 1186 (1961).

[474] Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460, at 521; 81 S. Ct. 1153, at 1186 (1961). Note that Frankfurter's rationale appears to reveal some internalization of the ancient stereotypes of the wily Jewish merchant upon which Shakespeare based his character, Shylock in his play, *The Merchant of Venice.*

[475]Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460, at 469; 81 S. Ct. 1153, at 1158 (1961) citing *Sonzinsky v. United States*, 300 U.S. 506, 513-514, 57 S. Ct. 554, 556, 81 L. Ed. 772; *Veazie Bank of Fenno*, 8 Wall. 533, 19 L. Ed. 482; *Arizona v. California*, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154; *Oklahoma ex rel. Phillips V. Guy F. Atkinson Co*., 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487.

insisting they would be at even greater disadvantage if no Sunday closing laws regulated the competitors who would otherwise conduct business seven days a week. The Justice dismissed the challenge against the non-exempting statutes with the assertion that community interests had been determined to outweigh the imposition of legally mandated Sunday closings upon Sabbatarians' religious freedom "by every court which has considered the question during a century and a half."[476] In determining constitutionality of the Pennsylvania Statute, Justices Frankfurter and Harlan determined that "a contrary conclusion cannot be reached."[477] In the same manner, Frankfurter dismissed due process and equal protection challenges with an acknowledgment of the local complexities that placed legislative determinations outside the scope of judicial review.[478]

In the end, Frankfurter broke ranks with his cohort Harlan and the Warren majority over the *Braunfeld* decision. Frankfurter insisted that the *Braunfeld* case had arrived "in a different posture" and should be remanded back to the lower court.[479] The Federal District Court had dismissed the *Braunfeld* Appellants' amended complaint without ever considering the retailers' new allegations that Pennsylvania's 1959 Sunday retail closing law was irrational and arbitrary. While pessimistically reciting the difficulty in proving their case, Frankfurter nevertheless insisted that the *Braunfeld* Appellants be given that opportunity if they so chose.[480] Although he referenced the historic need for First Amendment "protection of unpopular creeds" against the "persecutions and impositions

[476] Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460, at 522; 81 S. Ct. 1153, at 1186 (1961).
[477] Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460, at 522; 81 S. Ct. 1153, at 1186 (1961).
[478] Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460, at 524, 531; 81 S. Ct. 1153, at 1188, 1192 (1961).
[479] Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460, at 543; 81 S. Ct. 1153, at 1198 (1961).
[480] Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460, at 543; 81 S. Ct. 1153, at 1198 (1961).

of civil disability" visited by "sectarian majorities," Justice Frankfurter never showed sympathy for the Orthodox Jews' plight under the Sunday closing laws. Instead, he insisted that:

> "However preferable, personally, one might deem such an [Sabbatarian] exception, I cannot find that the Constitution compels it."[481]

Justice Douglas clearly felt otherwise. He not only dissented from the majority opinion in *Braunfeld*, but wrote a multi-case opinion disagreeing with the Court's decision in all four cases.[482] Electing to write his own opinion, Douglas was the only justice to consistently rule unconstitutional any blue law that failed to exempt Sabbatarians. For Douglas, the proper question did not focus on a common day of rest or Sunday habits but rather on:

> "whether a State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority."[483]

In his opinion, no other Justices had answered this question. His own answer was negative:

> I dissent from applying criminal sanctions against any of these complainants since to do so implicates the States in religious matters contrary to the constitutional mandate.[484]

Admonishing the majority that even reasonable regulation of religious practice ignored the U.S. Constitution's religious free exercise clause, Justice Douglas named the

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[481] Justice Frankfurter's Concurrence published at McGowan v. State of Maryland, 366 U.S. 460, at 520; 81 S. Ct. 1153, at 1186 (1961).
[482] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. 420; 81 S. Ct. 1218 (1961).
[483] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. 420; 81 S. Ct. 1218 (1961).
[484] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 562; 81 S. Ct. at 1219 (1961).

First Amendment as his starting point.[485] For Douglas, it was plain that the free exercise clause prevented government from "limit[ing] the freedom of religious men to act religiously"[486] and the establishment clause forbad government from putting legal force behind "any law which selects any religious custom, practice or ritual."[487] Rather,

> "[The First Amendment] admonishes government to be interested in allowing religious freedom to flourish – whether the result is to produce Catholics, Jews, or Protestants, or to turn the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral."[488]

Quoting from Cohen's *Legal Conscience* , Douglas conceded that most judges and lawyers, like most human beings, are "as unconscious of our value patterns as we are of the oxygen that we breathe."[489] Still,

> "Sunday is a word heavily overlaid with connotations and traditions deriving from the Christian roots of our civilization that color all judgments concerning it."
>
> "I do not believe that because I have set aside Sunday as a holy day I have the right to force all men to set aside that day also."[490]

Douglas wryly questioned whether American citizens would protest laws making it a crime to open shops on the Jewish Sabbath or not to observe the month-long Moslem fast

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[485] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 420; 81 S. Ct. at 1218 (1961).
[486] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 564; 81 S. Ct. at 1219 (1961). Douglas goes on to state that the free exercise clause does not "restrict the freedom of atheists or agnostics."
[487] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 564; 81 S. Ct. at 1220 (1961).
[488] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 565; 81 S. Ct. at 1219 (1961).
[489] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 565; 81 S. Ct. at 1220 (1961) citing Felix S. Cohen, *Legal Conscience* (New Haven: Yale University Press 1960), p. 169.
[490] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 565; 81 S. Ct. at 1220 (1961).

during Ramadan.[491] Insisting that the State's secular characterization of a law was not binding upon the U.S. Supreme Court, Douglas stated that the court was to reach its own conclusions on the "character, effect, and practical operation of the statute in determining its constitutionality."[492] For him, it was clear:

> "[B]y these laws the States compel one, under the sanction of law, to refrain from work or recreation on Sunday because of the majority's religious views about that day. … By what authority can government compel it?"[493]

The Warren Majority Opinion and Frankfurter/Harlan Concurrence upholding four States' non-exempting Sunday closing laws not only effectuated a "drastic break from tradition,"[494] but a "sharp break with the American ideal of religious liberty as enshrined in the First Amendment."[495] Bill of Rights guarantees of free speech, press, assembly, and worship "should be applied to the States with the same firmness as it is enforced against the Federal Government."[496] As such, there was no place for a balancing test between the majority's need for rest and Sabbatarians' habits of worship and commerce.[497] Douglas insisted:

> A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems … The religious regime of every group must be respected – unless it crosses the line of criminal conduct."[498]

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[491] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 564-565; 81 S. Ct. at 1220 (1961).
[492] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 573; 81 S. Ct. at 1224 (1961).
[493] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 575; 81 S. Ct. at 1225 (1961).
[494] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 575; 81 S. Ct. at 1225 (1961).
[495] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 576; 81 S. Ct. at 1226 (1961).
[496] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 561; 81 S. Ct. at 1228 (1961).
[497] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 575; 81 S. Ct. at 1226 (1961).
[498] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 575; 81 S. Ct. at 1226 (1961).

Douglas declared unconstitutional the laws contested not only in *Braunfeld* , but in each of the other cases.[499] Specifically, the States' legal mandate of Sunday closing violated the Establishment Clause by unconstitutionally placing the sanction of law behind the Christian majority's religious practice of Sunday worship and rest. The same States' laws violated the Free Exercise Clause by unconstitutionally interfering with the dictates of Sabbatarians' religious conscience by requiring them to conform with the religious scruples of the community. [500] In rejecting these laws, Douglas urged American citizens to respect each other's beliefs and honor each other's religious practices.[501]

In dissent of the *Braunfeld* decision, Justice Douglas was joined by Justices Brennan and Stewart who wrote separate opinions. Like the Warren majority, Justice Brennan found no merit in the Appellants' establishment and equal protection challenges. His dissent was based upon his finding that the Pennsylvania Sunday closing law unconstitutionally violated the freedom of the Orthodox Jewish Appellants to exercise their religion.[502] In contrast to the majority, Brennan chose to approach the case "from the point of the individuals whose liberty is – concededly – curtailed by these enactments."[503] Thus, Brennan (unlike any of the other Justices) underscored the Appellants fervent

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[499] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 577; 81 S. Ct. at 1226 (1961).
[500] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 576-577; 81 S. Ct. at 1226-1228 (1961). Douglas noted that the indirect injuries which Sunday Closing Laws wrought upon Orthodox Jews and Sabbatarians "places them at competitive disadvantage and penalizes them for adhering to their religious beliefs." Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 578; 81 S. Ct. at 1227 (1961).
[501] Justice Douglas's Dissent at McGowan v. State of Maryland, 363 U.S. at 580-581; 81 S. Ct. at 1228 (1961).
[502] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 610; 81 S. Ct. 1149, at 1149 (1961).
[503] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 610; 81 S. Ct. 1149, at 1149 (1961).

belief that "one who does not observe the Sabbath [by refraining from labor] cannot be an Orthodox Jew."[504] As Brennan saw it, the central issue in the *Braunfeld* case was:

> "whether a State may put an individual to a choice between his business and his religion."[505]

While noting that the majority decided that it may, Brennan firmly dissented for he believed that "such a law prohibits the free exercise of religion."[506] Brennan insisted that the liberty to believe and practice one's religion was "one of the highest values of our society" holding an "honored place … in our constitutional hierarchy."[507] The Majority's ruling had changed that by allowing a substantial state interest, "cloaked in the guise of nonreligious public purpose," to justify encroachment upon a minority's religious practice.[508]

Brennan realized that the Pennsylvania law imposed upon Orthodox Jews was a substantial, if indirect burden.[509] Compelled by their religion not to work on the Sabbath, observant Sabbatarian business people forfeited the profits otherwise earned during the busy shopping times of Friday evenings and Saturdays. Their only hope of recouping a portion of those losses was by opening Sunday.[510] Although Pennsylvania's blue law did not prohibit the Appellants from working on Saturdays, the effective result was to prevent anyone from being "an Orthodox Jew and compet[ing] effectively with his Sunday-

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[504] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 610 ; 81 S. Ct. 1149, at 1150 (1961). Brennan's fervent Catholic faith and regular attendance at Mass may have afforded him the unique ability to understand that the Orthodox Jews' religious faith mandated Sabbath observance, leaving them with no choice but to observe the Sabbath if they were to remain an Orthodox Jews. *For information on Brennan's religious views see:* Belknap, "God and the Warren Court," p. 403.
[505] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 611; 81 S. Ct. 1149, at 1150 (1961).
[506] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 611; 81 S. Ct. 1149, at 1150 (1961).
[507] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 612-613; 81 S. Ct. 1149, at 1150-1151 (1961).
[508] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 613; 81 S. Ct. 1149, at 1151 (1961).
[509] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 614; 81 S. Ct. 1149, at 1151 (1961).
[510] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 611 ; 81 S. Ct. 1149, at 1150 (1961).

observing fellow tradesmen."[511] It created the same economic disadvantage as taxes on religious practices, which were previously ruled invalid. Yet, the Majority upheld the blue laws without exemption for the "mere convenience of having everyone rest on the same day."[512]

Failing to appreciate the state-imposed burden upon Orthodox Judaism, the majority had applied the less exacting test of a substantial State interest behind the law and the statute's rational relationship with a legitimate legislative purpose. In doing so, Brennan believed that the Court had:

> "exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous."[513]

In upholding the Pennsylvania statute without exemption, Brennan charged the Court with creating difficulties "more fanciful than real."[514] Of the thirty-four states that then had general blue laws, twenty-one possessed Sabbatarian exemptions. Yet, these exemptions did not seem to interfere with public rest. Second, official inquiry into the good faith of those claiming religious exemptions had proven constitutional when previously challenged in *United States v. Ballard*.[515] Third, the Majority committed just such an inquiry when it investigated plaintiff's religious beliefs before granting him standing to claim violation of the First Amendment's Free Exercise Clause. Finally, Brennan found the Majority's concern for antidiscrimination laughable when another

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[511] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 613; 81 S. Ct. 1149, at 1150 (1961).
[512] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 614; 81 S. Ct. 1149, at 1150 (1961).
[513] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 615-616; 81 S. Ct. 1149, at 1152 (1961).
[514] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 615; 81 S. Ct. 1149, at 1152 (1961).
[515] *United States v. Ballard*, 322 U.S. 78, 64 S. Ct. 882, 6 L. Ed. 2d 393 (1941), is cited within Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 615; 81 S. Ct. 1149, at 1152 (1961).

Pennsylvania statute allowed hiring on a religious basis if it was a *bona fide* occupational qualification.[516]

In the final analysis, Brennan understood that the Pennsylvania blue law compelled Orthodox Jewish merchants to choose between their faith and their livelihood.[517] Only a compelling state interest could justify Pennsylvania's imposition of this religious choice. Brennan was clear that mere convenience of a common day of rest did not qualify as such a justification.[518] The First Amendment guaranteed personal liberty, rather than the fulfillment of collective aims.[519]

Justice Stewart began his own dissent by substantially agreeing with Brennan.[520] Yet, Stewart characterized the effect of the Majority's opinion in even starker terms. Justice Stewart asserted that the Pennsylvania law compelled Orthodox Jews to make "a cruel choice" between their religious faith and their economic survival.[521] It was a choice he believed "no State can constitutionally demand."[522] Such a gross violation of the First Amendment's religious free exercise guarantee could not be "swept under the rug and forgotten in the interest of enforced Sunday togetherness."[523] Although Justices Brennan and Stewart refused to join Douglas' general dissent, they were at least consistent in

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[516] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 614-615; 81 S. Ct. 1149, at 1151-1152 (1961).
[517] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 611; 81 S. Ct. 1149, at 1150 (1961).
[518] Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 613-614; 81 S. Ct. 1149, at 1151 (1961).
[519] Justice Stewart's Dissent in *Braunfeld v. Brown*, 366 U.S. 616, at 616; 81 S. Ct. 1152, at 1152 (1961).
[520] Justice Stewart's Dissent in *Braunfeld v. Brown*, 366 U.S. 616, at 616; 81 S. Ct. 1152, at 1152 (1961).
[521] Justice Stewart's Dissent in *Braunfeld v. Brown*, 366 U.S. 616, at 616; 81 S. Ct. 1152, at 1152 (1961).
[522] Justice Stewart's Dissent in *Braunfeld v. Brown*, 366 U.S. 616, at 616; 81 S. Ct. 1152, at 1152 (1961).
[523] Justice Stewart's Dissent in *Braunfeld v. Brown*, 366 U.S. 616, at 616; 81 S. Ct. 1152, at 1152-1153 (1961). *See* Belknap, "God and The Warren Court," p. 420.

objecting to the Warren Majority's holding in the two cases involving religious concerns, *Crown Kosher Super Market* and *Braunfeld*.[524]

Orthodox Jews took heart from their dissent. While expressing "deep dissatisfaction" with the Supreme Court's Sunday closing laws decisions, the Rabbinical Council of America's President Weinberg asserted his firm "belief that the dissenting opinions of Justices Stewart, Brennan, and Douglas will eventually be adopted as the ruling law." He then appealed to "state and local officials and legislators … to rectify the injustices which flow from the Supreme Court's opinion."[525]

Voicing their objections to the *Braunfeld* ruling, many American Jews immediately realized that quiet complacency and unreflective assimilation posed greater dangers to their communal identity and continued existence than anti-Semitism.[526] Other Jewish Americans tempered their disappointment with emphasis upon the Warren Majority's pledge to closely examine blue laws to prevent "use of state's power to aid religion." They praised the Douglas Dissent, especially his assertion that "those who fashioned the Constitution decided that … His [God's] service will not be motivated by coercive measures of government."[527] At least one observer believed that the U.S. Supreme Court's Sunday decisions had a "wholesome" effect on Jewish agencies,

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[524] *Gallagher v. Crown Kosher Super Market* , 366 U.S. 617, 633 (1961); *Braunfeld v. Brown*, 366 U.S. 610 and 616, 81 S. Ct. 1149 and 1152; 6 L. Ed. 2d 563 (1961)**.** *See McGowan v. Maryland* , 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) and *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961).

[525] ___, "Church-State Issues: Sunday Closing Laws," *America Jewish Year Book* , Vol. 63 (Philadelphia: The Jewish Publication Society 1962), pp. 191-192 citing the words of President Weinberg of the Rabbinical Council of America as recorded in its July 1961 *Rabbinical Council Record*.

[526] Ben Halpern, "America is Different," *The Jews: Social Patterns of An American Group*, M. Sklare, ed. (Glencoe, IL: The Free Press 1960), pp.23–39, at pp. 25., 27-29.

[527] *See* ___, "Church-State Issues: Sunday Closing Laws," *America Jewish Year Book* , Vol. 63 (Philadelphia: The Jewish Publication Society 1962), pp. 192.

separating the cause of religious freedom from the commercial interests of predatory businesses solely concerned with achieving a seven-day shopping week.[528]

At least one Jewish observer suggested that perhaps the Jewish community expected too much. Milton R. Konvitz speculated that had the U.S. Supreme Court held the Sunday closing laws unconstitutional under the establishment clause, most Americans would have reacted with revulsion and panic. In the aftermath of the 1954 *Brown v. Board of Education* decision, citizens felt uprooted and extremely sensitive to the Supreme Court's interference with old, settled institutions. The Sabbath laws were not only viewed as rooted in Christian religion and folkways, but justifiable protections of the public welfare.[529]

Despite great social transition and the increasing diversity created by the 1965 Hart-Cellar Immigration Act, nothing much has changed.[530] The U.S. Supreme Court has yet to move beyond its approval of the exemptionless Sunday closing acts expressed in its 1961 decisions in *McGowan, Two Guys, Crown Kosher Super Market,* and *Braunfeld*.[531] Today, Sunday closing laws remain on the books, continuing and are sometimes enforced. Once validated by the U.S. Supreme Court, they have never been formally overturned.[532] State-wide blue laws remain on the code books of at least eight American

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[528] Milton R. Konvitz, "Inter-Group Relations," *The American Jew: A Reappraisal* , O.I. Janowsky, ed. (Philadelphia: The Jewish Publication Society of America 1964), pp. 75-99, pp. 88-89.
[529] Konvitz, "Inter-Group Relations," *The American Jew: A Reappraisal*,, pp. 75-99, at pp. 87-88.
[530] Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified in various sections of 8 U.S.C.).
[531] *See* Peter Wallenstein, *Blue Laws an Black Codes: Conflict, Courts, and Change in Twentieth-Century* (Charlottesville, VA: University of Virginia Press 2004), p. 56.
[532] However, it must be noted that the Braunfeld Case has been considered by some effectively overturned by the Court's subsequent ruling in *Sherbert v. Verner*. In that case, a state statute was held to violate the First Amendment Free Exercise Clause for denying a Seventh Day Adventist unemployment compensation benefits when she quit her job rather than violate her religious precepts and work on Saturdays. The Majority distinguished the Braunfeld Case while setting the subject the state statute aside as constitutionally violative. While concurring in the result, Justice Stewart used the opportunity to make this point explicit: "But it is clear to me that in order to reach this conclusion the Court must explicitly reject the reasoning of Braunfeld v. Brown. ***I think the Braunfeld case was wrongly decided and should be***

States. There, they continue to be viewed as proper use of state police powers in promoting the health and welfare of local citizens.[533] However, Sunday closing laws are largely ignored and hardly ever enforced. Despite the *Braunfeld Ruling*, the American people continued to shop and to recreate on Sundays. Because so many in the general population were willing to break the law for convenience, the U.S. Supreme Court's ruling was undermined.[534] Through such behavior, the American people have demonstrated that in the end, the U.S. Supreme Court can not legislate values. The Court can pronounce principles, but those dictates only become norms when people adopt them and apply them to their daily lives.

F. Jewish Membership & American Citizenship:

In the wake of the U.S. Supreme Court's *Braunfeld* holding, Jews and other Sabbatarians were left with only three choices as to how to interact with American

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overruled, and accordingly I concur in the result reached by the Court in the case before us." (emphasis added) *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). *See also* McDaniel v. Paty, 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593, 1978 U.S. LEXIS 81 (1978).

[533] *See* ___, "Blue Law Special," *Christianity Today*, Public Policy Section (January 2007), p. 21. These states include: Colorado, Georgia, Minnesota, North Dakota, Pennsylvania, South Carolina, Utah, and West Virginia. In some states where blue laws have been overturned, counties and municipalities continue to enforce Sunday closing ordinances. Note that while the U.S. Supreme Court has never formally overruled the blue laws, at least one dissenting justice viewed it as implicitly overruled by the Court's decision in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). However, Regent University Law Professor Bradley Jacob explains that "Blue laws fell because they became politically untenable. Not only did non-Christians find them unfair, but even Christians found them silly, archaic, and legalistic." "Blue Law Special," p. 21. That said, two economists recently published an empirical report that correlated the decline in church attendance and church donations with the rise in alcohol and drug abuse in the fifteen states that repealed blue laws. The economists stated, "We find that repealing blue laws leads to an increase in drinking and drug use behavior. To confirm the causal nature of these findings, we compare the impacts on individuals who were attending church before the law changes and were therefore affected, with those who were non-attendees, and we find the effects are concentrated in the former group." Jonathan Gruber and Daniel M. Hungerman, "The Church vs. The Mall: What Happens When Religion Faces Increased Secular Competition?" NBER Working Paper 12410, p. 2, 19, 29, and 37, accessed at http://www.nber.org/papers/w12410 on 4/14/2008; *See also* ____, "Sunday Morning Coming Down," *The Atlantic Monthly*, Religion Section (November 2006), p. 42.

[534] Ringwald, A Day Apart, p165; ___, "Blue Law Special," *Christianity Today*, Public Policy Section (January 2007) p. 21.

society. These religious minorities could secularize, privatize, or separate. They could capitulate to assimilation pressures and forsake their Judaism to become secular like other Americans. This was the Orthodox Jews' worst nightmare, but a lifestyle opted for by many upwardly mobile American Jews.[535]

Second, they could compartmentalize their religious lives, keeping their religious beliefs and practices in the privacy of their homes and synagogues while following secular norms and patterns in their business relationships and public interactions. This was the middle path and so the strategy most Jews chose, whether they espoused a Conservative, Reform, or Reconstructionist theology.[536]

Finally, certain Jews emphasized faithful observance of *halakhah* and choose to separate themselves from the rest of American society, living in urban and suburban enclaves surrounded by other Jews and their own way of life. Traditional Orthodox Jews increasingly opt for this way of life, reminiscent of their ancestors' lifestyle under persecution. Initially, the traditionalist path seemed a dead-end choice which many predicted was destined to pass away as the recently immigrants were succeeded by American-born generations. Instead, Traditional Orthodox Judaism has proven attractive to younger generations and the number of its adherents has risen dramatically in recent years.[537]

There are many factors advancing the growth of Traditional Orthodox Judaism in America, but the U.S. Supreme Court's decision in *Braunfeld* could only have

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[535] Samuel C. Heilman, *Sliding to the Right: The Contest for the Future of American Jewish Orthodoxy* (Berkeley : University of California Press 2006), p. 38. *See also* Samuel C. Heilman, *Portrait of American Jews: The Last Half of the Twentieth Century* (The Samuel and Althea Stroum Lectures in Jewish Studies) (University of Washington Press 1995), pp. 60, 74, 82-84.
[536] Quotes from Gopler & Rabbi Issac M. Wise about Jewish at home and American everywhere else.
[537] *See* Heilman, *Sliding to the Right*, pp. 17, 23, 28-32, 37-41.

contributed to its rise. In response to the ethnic-group consciousness and social unrest raised by the 1950's and 1960's civil rights movements, religious fundamentalism has been on the ascendancy in many faith traditions (including both Christianity and Judaism). The most likely reason is a general fear of chaos and disorder accentuated by the turbulence of protest and unrest wrought by liberal challenges to the order previously established by social, economic, and political elites. Traditional religious beliefs and fundamentalist leanings provide an orienting framework and sense of stability that calms this fear of social disorder and reassures adherents that the Divine controls the future.[538]

In upholding state blue laws mandating a Sunday day of rest and denying Jews their religious right to observe the Sabbath, the U.S. Supreme Court's holding in *Braunfeld* could only serve to confirm Orthodox concerns about the profane condition of United States, to underscore the fragility of Jews' religious liberty, and to reinforce the secular nature of American society. It certainly did nothing to discourage Traditional Orthodox Jews from retreating from the U.S. social scene into their own religious-ethnic enclaves and stubbornly adhering to their insular, time-honored, religiously-observant ways of life. Many Orthodox Jews have come to feel that they must make a choice between their faithful observance of Judaism and their active membership in the larger U.S. society.

These observations lend credence to the theories of social psychologists cited by Barbara J. Redman in her article, "Sabbatarian Accommodation in the Supreme Court."[539] Applying the psychological theory of "cognitive dissonance," Dr. Redman argues that failing to provide blue law exemptions for Sabbatarians puts them in a

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[538] *See* , Samuel C. Heilman, *Sliding to the Right: The Contest for the Future of American Jewish Orthodoxy* (Berkeley, CA: University of California Press 2006), p. 7.
[539] Barbara J. Redman, "Sabbatarian Accommodation in the Supreme Court," *The Supreme Court in American Society: Equal Justice Under Law* (New York: Garland Publishing, Inc. 2000), pp. 457-523, p. 472.

situation where they must choose between their faith and their livelihood. The more deeply the individual holds to religious belief, the more difficult the choice. If the person chooses to observe religious practice at the expense of economic benefit, religion takes on greater import by virtue of the sacrifice. This creates the need for self-justification of the detrimental choice. Redman insists that this "self-justification can produce more firmly held beliefs."[540] However, if the individual chooses to forego observance of the Sabbath in favor of economic benefit, "the choice may be rationalized by a change in belief, or the lessening of the importance attached to the belief and the practice of it." [541] Further, she notes that if the individual perceives that the choice is forced upon him/her by an external force and not a matter of free will, "there possibly will be no change in the individual's belief structure and/or learning to live with inner turmoil." [542] Dr. Redman concludes that "if the individual is forced or induced to accept Saturday employment in violation of his/her beliefs, there will be an adverse impact on religious beliefs." [543]

Despite Dr. Redman's assurance, there appears to be another logical conclusion –such discriminatory legislation and insensitive judicial rulings do nothing to encourage majority tolerance or minority respect for the law. Such legislative enactments and court decisions not only fail to uphold constitutional guarantees of religious liberty, but discourage religious minorities from embracing their American citizenship and contributing their religious resources to strengthen U.S. society.

While many Orthodox Jews in America seem to be becoming more insular, notable exceptions exist. Some Orthodox Jews have become increasingly active in the U.S.

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[540] Redman, p. 472.
[541] Redman, p. 472.
[542] Redman, p. 472.
[543] Redman, p. 473.

political scene**.** In every U.S. presidential administration since Jimmy Carter, Lubavitcher Hasidim[544] have had a presence. During the ninety-fifth through ninety-ninth U.S. Congresses, Speaker Tip O'Neill's chief legislative aid was Ari Weiss, an observant Orthodox Jew who openly donned a yarmulke. And, Orthodox groups continue to lobby Congress, including the Union of Orthodox Jewish Congregations of America, National Council of Young Israel, Agudath Israel, and Lubavitcher Hasidim. Both Orthodox individuals and organizations remain even more politically active at the local and state levels. This is particularly true in New York City where Orthodox constitute almost 20% of the Jewish population.[545]

Orthodox Jewish Sabbath practices no longer create a stigma in America. Instead, the practice raises only mild public curiosity. Senator Joseph Lieberman proved this point when, as the Democratic Party's 2000 Vice-Presidential Candidate, he publicly acknowledged his Orthodox Judaism and explained his traditional Sabbath observance.[546] Asked to explain how he would rectify his Sabbath observance with the demands of the Vice-Presidential office, Lieberman candidly responded that he would work on the Sabbath only if necessary to "promote the respect and protection of human life and well-being."[547] Americans' puzzlement seemed to reflect the increasing secularization of U.S. society. Yet, Senator Lieberman's honest disclosure of his religious beliefs and practices

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[544] The only remaining branch of the Chabad movement, Lubavitcher Hasidim is one of the largest Hasidic movements in Orthodox Judaism. Presently, it is based in Brooklyn's Crown Heights neighborhood. *See* *http://www.chabad.org/global/about/article_cdo/aid/36226/jewish/Overview.htm* accessed on 4/09/2008.

[545] Samuel C. Heilman, *Sliding to the Right: The Contest for the Future of American Jewish Orthodoxy* (Berkeley: University of California Press 2006), pp. 6-7.
[546] Jack Wertheimer, "American Jewry Since 1945," *From Haven to Home: 350 Years of Jewish Life in America*, M. W. Grunberger, ed. (New York : George Braziller in association with the Library of Congress, 2004) , p. 116. *See also* Heilman, *Sliding to the Right*, pp. 7.
[547] Mark Miller, "Houses of Worship: Keep it Holy," *The Wall Street Journal*, Taste Section (New York: Eastern Ed. August 11, 20000), p. W-13

has not impeded his subsequent political career. Unlike Catholic President Kennedy, Liebermann did not downplay his faith's claim upon his life nor bifurcate it from his political career. Rather, he admitted that for him, the theological justification for breaking Sabbath was protecting human life. His traditional faith and personal religious observance are frequently reported as a source of admiration by Americans of all faiths.[548]

Although the growth of the Orthodox Jewish population continues at a faster rate than other Jewish denominations, the majority of America's Jews continue to espouse Conservative, Reform, Reconstructionist, or Humanist views.[549] This majority remain active citizens who enthusiastically participate in American politics. Due to the success of the businesses and religious institutions which they have built, they enjoy political and economic influence far exceeding their small numbers. American Jews continue to count roughly 6 million, having not appreciably increased their numbers in the last fifty years.[550] Intermarriage and assimilation may continue to plague their increase,[551] but it is certain that Jews will continue to assert their communal will and meet their citizenly duty to support the liberal values underlying U.S. Constitutional norms.

The *Braunfeld Decision* may be interpreted in very different ways. Some may see it as the Supreme Court's attempt to uphold reasonable state limits that support common civic

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[548] Mark Miller, "Houses of Worship: Keep it Holy," *The Wall Street Journal*, Taste Section (New York: Eastern Ed. August 11, 20000), p. W-13. *See also*, Diner, *The Jews of the United States*, p. 8.Samuel C. Heilman, *Sliding to the Right: The Contest for the Future of American Jewish Orthodoxy* (Berkeley, CA: University of California Press 2006), p. 7.
[549] *Supra*, ftn.15 above.
[550] Jack J. Diamond, "A Reader in Demography,: *American Jewish Year Book*, Vol. 102 (2002), pp. 255, 615; Jonathan Sarna, *American Judaism: A History* (CT: Yale University Press 2004), p. 375.
[551] Michael H. Stenhardt, "On the Question of Crisis," *Contact: The Journal of Jewish Life Network*, Vol. 5, No. 3 (Spring 2003), pp. 9-10, at p. 9.

practices.[552] Others may interpret the Court's ruling as preserving distinct American traditions and accepted patterns of behavior.[553] One could say that the Court decided to preserve legislated conformity rather than require the state to create exceptions for those with contrary religious practices.

Whatever interpretation is applied, there remains an inherent tension between obligations of duty and perceptions of membership. As an Orthodox Jew, Braunfeld could not observe the Sabbath and still be able to preserve his business. The lost revenues were simply too great, unless partially offset by Sunday profits. On the other hand, if Braunfeld closed his store on Sunday as the civil law prescribed, he could not afford to dutifully observe *halakhahic* law and make holy the prescribed Sabbath. From the state legislators' perspective, their duty was to the majority of citizens who would be upset if their common day of rest was disrupted by Braunfeld's competitive enterprise. By undermining shared Sunday respite, Braunfeld would help create a disruptive situation of noise, activity, and competition. This might create demand that would force employers to ask ordinary people to work on their one day off. Besides, the law did not force Braunfeld or other Jews to close on Saturdays. It was their choice, given their insistence in upholding such strict faith beliefs. The U.S. Supreme Court preferred to defer to the state

[552] According to this view, the Court refuses to impose its will upon a state legislature, particularly when law makers are attempting to craft reasonable limits. The majority should not have to adapt laws that do not directly infringe upon religious practices, but merely limit personal preferences made around those practices. After all , traditionalists have made the choice to strictly observe distinct religious practices to which most within their own broader minority faith tradition do not adhere. The religious have made this choice and so must bear the costs, not the majority. This interpretation is further supported by the fact that the Warren Court has been credited with expanding the reach and substance of personal liberty and equal rights. Elizabeth Mensch, "The History of Mainstream Legal Thought," *The Politics of Law: A Progressive Critique*, D. Kairys, ed. (New York : Basic Books 1998), pp. 23-53, p. 44.

[553] For the Court to rule otherwise would not only undermine these traditions, but create inconvenience for a much larger number of citizens.

legislature, since its' members better understood the local context and had been elected to represent the majority's will.

The cutting edge in the *Braunfeld Case* was clearly membership. The contested duties were only important because they were requirements for membership. The duty to observe the Sabbath was a required practice that defined one as a Jew. Absent honoring the Lord's Day, the Orthodox community no longer considered a man to be a member because he had failed to follow one of the Lord's basic prescripts, as set forth in the Torah. God's transcendent law and the faithful remnant were of greater importance than the external society. However, for the legislators, the common day of rest was an established courtesy extended by each member of the civic community to all the others. For Braunfeld to dishonor this civic practice was akin to dishonoring the community and attempting to subvert its welfare. Doing so in the interests of finances just made matters worse.[554] The Supreme Court majority understood the legislators communal concerns, just as the minority justices recognized the cruelty of Braunfeld's dilemma.

Unlike Justice McReynold's opinion in *Pierce*, the trajectory of the *Braunfeld Decision* undoubtedly was away from the appreciation of religious liberty and toward social conformity. The community which Justice Warren' s decision emphasized was the local American community. Thus, the citizenship norms encouraged were those of deference and conformity to majority practices rather than respect and appreciation for the minority's religious duties.

However, the public majority did not choose to follow the Warren Court's lead toward Sunday rest and legal conformity. Instead, they reacted to longer work weeks and less free time by taking advantage of the Sunday conveniences supplied by Jewish merchants

[554] *See* Lund, *supra. ftn. 66 above*.

and suburban retailers. All told, it was the American public that undermined the blue laws in favor of greater convenience and easy access. Sunday Closing Laws may remain on the ordinance books, but they have been rendered largely obsolete and are regularly ignored. Rather, American convenience replaced the Warren protected norm of civic rest. As Sunday store hours and suburban neighborhoods increased interactions between Jews and Christians, American citizens did develop greater tolerance, increased understanding, lasting respect, and even friendship across religious lines. Yet, an honest assessment shows that secular demands and modern conveniences, not religious liberty and free exercise, were the catalyst for this American movement toward greater tolerance and integration.

Chapter 6: The Theology-Ideology Debate:
Muslim Participation and American Civic Membership (1965-2007)

Today, Islam is arguably the fastest growing and most misunderstood religion in America.[555] Quietly increasing in number after the Immigration Act of 1965 eased restrictions, Muslim presence was brought to U.S. public attention by the recent events of September 11. This experience has strengthened the determination of many Muslims to become American citizens on their own terms, placing their religious identity first. Still, American sensibilities continue to inform their twin goals, liberty of conscience and vigorous participation in the public square. Despite biased government applications of the Patriot Act and widespread social discrimination, many of America's Muslims remain eager to demonstrate to U.S. society the differences between traditional Muslim theology and Islamic ideas twisted to substantiate political ideology. Too often, their attempts to correct public perceptions, like their service to their communities, have been ignored or dismissed by the media. Through Islamic efforts, U.S. understanding of the requirements of religious liberty and the parameters of American citizenship continue to be tested.

Recent Muslim experience in America has been characterized by the tensions arising between their sense of Islamic community membership and the expectations of full participation as U.S. citizens. Together, they are attempting to negotiate the tensions between the foundational elements of their communal religious membership with their growing need for civic participation. Like Catholics and Jews before them, Muslim Americans are encountering similar frictions between their religious rights and civic perceptions of patriotic duty as well as their religious duties and the common limitations

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[555] J. Miller, A. Kenedi, eds. *Inside Islam: The Faith, the People and the Conflicts of the World's Fastest Growing Religion* (Da Capo Press 2002). *See also* Barr Seitz, of ABCNEWS.com, "Fastest-Growing Religion Often Misunderstood," accessed at http://www.iol.ie/~afifi/BICNews/Islam/islam21.htm on November 28, 2007.

imposed by civic membership. The current context and social location of Islamic Americans simply accents their civic participatory efforts as the cutting edge moving their community toward public acceptance as full U.S. citizens. Intrepidly, Islamic Americans continue to challenge overreaching national security laws and discriminatory policies through established civic channels, including the nation's courts. Through Muslim encounters with American society, U.S. citizenship norms are again being tested and a distinctively American Islam is taking shape.

As with Catholicism and Judaism, Islam was present from the time of the New World's discovery and the colonization of the Americas. Yet, Muslims have experienced unique challenges in their struggle to establish an American presence. Race, slavery, and difference have not only shaped perceptions of Islam, but made it difficult to cultivate a continuity of Muslim religious tradition on U.S. soil.

This chapter will first explore the three waves of Muslim immigration to America and the growth of African-American Islam. Along the way, we will witness Muslim encounters with the ignorance and prejudice of the majority, including their struggles to overcome discrimination. Then, through the facts and circumstances surrounding *Tabbaa v. Chertoff,*[556] we will examine current Muslim American attempts to defend their dual rights of citizenship and religious expression through the federal court system. Ultimately, our study will reveal that through active civic engagement and assertive political participation, Islamic Americans are earning greater public voice and increasing protection of their political rights. By demonstrating the four American citizenship elements of rights, duties, membership, and participation, U.S. Muslims are attempting to

[556] *Tabbaa v. Chertoff,* No. 05-CV-582S, 2005 U.S. Dist. LEXIS 38189 (W.D.N.Y. Dec. 21, 2005), aff'd, 509 F.3d 89 (2d Cir. 2007).

enter the American mainstream without loosing their distinct religious community or sacrificing their constitutional rights.

A. Islamic Explorers and Muslim Settlers

Muslims were among the first peoples to cross the Atlantic for the Americas. While historians continue to debate the veracity of Muslim explorers' claims to have discovered the New World, they can not refute that Columbus's route was influenced by the 13th century Muslim scholar Al-Idrissi nor that the Muslim Pinzon brothers captained two of his ships, the Nina and the Pinta.[557] While Muslims numbered among the original Spanish and Portuguese explorers, rumors persist of Morisco (Muslims forcefully converted to Catholicism), Melungeon (Arabic derived name for a Portuguese, North African/Turkish, and northern Indian mix), and Moorish (African Muslims) settlements that predated European colonization. Evidence of early Islamic encounters with indigenous Americans include the Jamestown explorers' verification of Native American reports concerning colonists to the north, whom they found to be bearded, praying "Moors" in North Carolina, and speaking Pima words of Arabic origin.[558] Yet, the murky

[557] Amir Nashid Ali Muhammad, *Muslims in America: Seven Centuries of History (1312-2000)* (Beltsville, MD: Amana Publications, 2d ed. 2001), p. 2; Geneive Abdo , *Mecca and Mainstreet: Muslim Life in America After 9/11* (New York: Oxford University Press 2006), p. 65. Note that Geneive Abdo relates not only the naval exploration and navigational innovations that resulted from the Islamic intellectual revolution of the eighth through twelfth centuries, but also of at least three Muslims reported to have crossed the Atlantic ocean – Khashkhash ibn Saeed ibn Aswad of Cordoba, an emissary of the Islamic King of Mali, and the Muslim Chinese Admiral Zheng. *For reference to the scholarly debate see also* Jane I. Smith, *Islam in America* (New York: Columbia University Press 1999), p. 51.

[558] Muhammad, Muslims in America, pp. 4-7' citing Dr. Barry Fell, *Saga America* (New York: Three Rivers Press 1983). *See also* Abdullah Hakim Quick, *Deeper Roots: Muslims in the Caribbean Before Columbus to the Present* (Nassau, Bahamas: AICCLA, 1990); Jack D. Forbes, "Negro, Black and Moor: The Evolution of these Terms as Applied to Native Americans and Others," *African and Native Americans: The Language of Race and the Evolution of Red-Black Peoples* (Urbana: University of Illinois Press, 2d. ed. 1993) pp. 65-92.; Martha Cobb, "Afro-Arabs, Blackamoors and Blacks: An Inquiry into Race Concepts Race Concepts Through Spanish Literature**."** *Black World* 21 (Feb 1972) pp. 32-40.

legacy of these early Muslim inhabitants bespeaks the transience of their distinctive presence and their eventual assimilation into native populations.

Among the African slaves forcefully brought to U.S. soil were a second wave of Muslim immigrants. While only constituting a discrete minority of early American slaves, estimates of Muslims in bondage extend to "tens of thousands."[559] Verifiable signs of Islamic slaves include Arabic name derivatives in runaway slave notices, reported Islamic practices including refusal to eat pork, praying prostrations five times daily in a certain direction, use of prayer beads, and recitations in a strange language. Tales survive of enslaved Moorish princes who wrote in a foreign language and were esteemed by their captors for their dignified bearing.

Although Islam helped some endure the conditions of their enslavement, the harsh context prevented bequest or spread of the faith. Families in bondage were separated and sold. Life was short and difficult. Time was structured and controlled by others. Arabic was both foreign and unpublished in America. Slaves were isolated from co-religionists and forcefully converted to Christianity. Under the circumstances, it is remarkable that evidence of Muslim slaves' faith survives today.[560] Their children, along with other slave

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http://www.muslimsinamerica.org/index.php?option=com_content&task=view&id=14&Itemid=28 and http://www.melungeons.com/articles/jan2003.htm and http://www.moriscos.org/ and accessed on 10/18/07

[559] Abdo , *Mecca and Mainstreet*, p. 66.

[560] Abdo , *Mecca and Mainstreet*, pp. 66-69. Three famous Muslim African slaves are Abrahim Abdul Rahman ibn Sori (1962-1829), Salih Bilali (1770-1840), and Omar ibn Said (1770-1864). Sori became known as the "Prince of Slave" after his slave owner allowed him to send a letter to Morocco which proved instrumental to his release and return to Africa after forty years of bondage. Bilali was enslaved in Temourah, West Africa and became the head slave manager for the Couper family on St. Simon Island. Through his intelligence, he not only saved his give hundred fellow slaves during both the War of 1812 and a great hurricane, but maintained his Muslim practices which influenced current Gullah culture. Finally, Said was captured in present-day Senegal and enslaved in Owen Hill plantation. Escaping his master, he was imprisoned in Fayetteville, NC where he persuaded James Owens to ransom him. His autobiography and assorted letters constitute the earliest known Arabic texts written in America. *See* Muhammad, *Muslims in America*, pp. 19-21, 27-29, 36-37, 39; Abdo, *Mecca on Mainstreet*, pp. 67-69.

descendants, would not receive Constitutional recognition of their citizenship until the 1870 passage of the Fifteenth Amendment.[561]

The next influx of Muslim immigrants, starting near the end of World War I, It came as the Middle East experienced the end of the Ottoman Empire and the institution of the mandate system. Seeking refuge from their troubled homelands, persons arrived in the United States from what is today Lebanon, Syria, Jordan, and Palestine. Although the vast majority was Christians, there were contingents of Sunni and Shi'ite Muslims in their midst, as well as some members of the Alawite and Druze sects. In an effort to avoid the label of Muslim "Turks," they collectively referred to themselves as "Syrians" even as official U.S. immigration records recorded their origin as "Turkey in Asia" or simply "Other Asian."[562] These Arab peoples tended to settle in isolated pockets of the industrial Northeast and rural Midwest where unskilled jobs were numerous. The mills of Maine, shipyards of Massachusetts, and auto factories of Michigan were huge draws. For these reasons, Dearborn, Toledo, and Detroit became major centers for Arab and Muslim immigrants. Albanian Muslims tended to settle in Maine while Lebanese clustered in Quincy, Massachusetts. Other Muslims became traveling peddlers and itinerate traders. Soon, Islamic Centers and prayer halls were founded in such disparate places as Michigan City, Indiana and Cedar Rapids, Iowa.

In the aftermath of W.W. I, Muslim immigration surged before it was quickly stymied by Congressional passage of the National Origins Act in 1921.[563] Elimination of the

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[561] U.S. CONST., amend. XV. For details of the Fifteenth Amendment's1870 ratification, see http://www.law.emory.edu/law-library/research/ready-reference/us-federal-law-and-documents/historical-documents-constitution-of-the-united-states/amendments-to-the-constitution.html accessed on 7/19/08.
[562] Abdo , *Mecca and Mainstreet*, p. 70.
[563] The National Origin Acts of 1921 and 1924 established strict national quotas on immigration from all non-Western European countries. National Origins Act, ch. 8, 42 Stat. 5 (1921); Immigration Act of 1924 (The Johnson-Reed Act), 68 Cong. Ch. 190, 43 Stat. 153 (1924) (repealed 1952).

Muslim immigration flow threatened the newly established ethnic communities' survival. Many slowly assimilated, their unique Islamic identity eventually subsumed into the surrounding majority culture through compliance, conformity, and intermarriage. Clustered together in isolation, some groups persisted and flourished based more upon tribal affiliation than universal Muslim identity.[564] Regardless of whether they surrendered or retained their ethnicity, these "prairie Muslims" were eager to identify themselves as American citizens.[565]

The occupation of peddling provided a quick and effective means of gaining cultural knowledge that allowed the Ottoman refugees to rapidly learn English and fit into U.S. culture[566] Their appearance and religion offered a far greater challenge, since these immigrants looked very different from the majority of their neighbors. Based solely upon the color of their skin, Federal courts in the South questioned whether they were eligible for U.S. citizenship under Jim Crow laws. In 1914, the Federal District Court in South Carolina ruled that Syrians were not eligible for U.S. citizenship because of their race.[567]

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[564] Abdo , *Mecca and Mainstreet*, pp. 70-72.; *See also* Smith, *Islam in America*, pp. 52, 55-60.

[565] These Muslim immigrants desire to be identified as American citizens can be demonstrated by the American names that they regularly chose for their children and the association labels which they assign to for their religious, institutional, and social establishments, such as: the oldest masjid in the U.S. commonly referred to as the "Mother Mosque of America" of Cedar Rapids, Iowa; New York City's American Mohammedan Society founded in 1907 Brooklyn; and the Arab American Banner Society formed in Quincy, Massachusetts in 1934. *See* Diana L. Eck, *A New Religious America: How a 'Christian Country' Has Become the World's Most Religious Diverse Nation* (San Francisco: HarperSanFrancisco 2001), pp. 228, 246. Abdo , *Mecca and Mainstreet*, pp. 70-72; Smith, *Islam in America*, pp. 52, 55-60.

[566] Eck, *A New Religious America*, p. 244; Haddad, *Not Quite Americ*an? (Waco, TX: Baylor University Press 2004, p. 47; *See also* Smith, *Islam in America*, p. 54.

[567] In re Dow, 213 F. 355, at 357 (E.D.S.C. 1914) at 357, eventually overruled by Dow v. U.S., 226 F 145 (4. th. Cir. 1915) as cited by Kathleen Moore, *Al-Mughtaribun: American Law an the Transformation of Muslim Life in the United States* (Albany: State University of New York Press 1985), p. 53 and later by Haddad, *Not Quite American?*, p. 47; Aminah Beverly McCloud,**,** *Transnational Muslims* (Gainesville : University Press of Florida 2006), p. 3. *Contra see:* R.L. H, Jr. "Aliens: Naturalization: Scope of Act of May 9, 1918," 10 *California Law Review* 59, at 61, fnt. 17 (Vol. 10, No. 1: Nov. 1921) regarding the impossibility of applying Congress's "free white" standard for naturalization uniformly as witnessed by cases admitting Syrians: *In Re Halladjian*, 174 F. 834 (C.C.D. Mass. 1909), *In re Najour*, 174 F. 735

It would take a decade before "Syrians" were officially categorized as white, thus becoming eligible for American citizenship.[568]

While orthodox Christian immigrants were largely accepted as a curiosity, Islam remained a challenge to public acceptance. The most famous example remains Abdullah Ingram's petition to have "Islam" replace "Other" as the religious affiliation recorded on his dog tags during W.W. II. While unsuccessful, Ingram received a reply from President Eisenhower that lamented such inequality in the U.S. military.[569] Steeled with determination to fight further discrimination, Ingram went on to found the first overarching U.S.-Canadian Muslim organization, the Federation of Islamic Americans in 1953. This group remained the most influential Muslim American organization until it ceded most of its power to the Muslim Students Association in the 1970's.[570]

(C.C.N.D. Ga. 1909), *In Re Mudarri*, 176 F. 465 (C.C.D. Mass. 1910), *In re Ellis*, 179 F. 1002 (D.C. Or. 1910).
Dow v. U.S., 226 F 145 (4. th. Cir. 1915), overruling Ex Parte Dow, 211 F. 486 (E.D.S.C. 1914) and In re Dow, 213 F. 355 (E.D.S.C. 1914).

[568] Dow v. U.S., 226 F 145 (4. th. Cir. 1915), overruling Ex Parte Dow, 211 F. 486 (E.D.S.C. 1914) and In re Dow, 213 F. 355 (E.D.S.C. 1914). *See* Ian Haney-Lopez, *White By Law: The Legal Correction of Race* (New York: New York University Press, 1996), p. 48-53; Kathleen Moore, *al-Mughtaribun: American Law and the Transformation of Muslim Life in the United States* (Albany, NY: State University of New York Press 1995); Haddad, *Not Quite American?*, p. 5, ftn.6.

[569] Haddad, *Not Quite American?*, p. 25; Smith, Muslim in America, p. 168.

See http://www.uiowa.edu/~c019225/military2.html accessed on 11/8/07 containing the following quote from Ingram's 1953 letter to President Eisenhower:.

> "Thousands of men of my faith have served to protect the principle of freedom of faith and many have given their life and had to be contented to have a 'P' [for Protestant],'C' [for Catholic], or 'J' [for Jewish] on their dog tag."

This website notes that although Eisenhower did not grant Ingram's request, the U.S. Department of Defense eventually changed its policy.

[570] Smith, *Islam in America*, pp. 168-169; Abdo, *Mecca and Mainstreet*, p. 101; Eck, *A New Religious America*, pp. 247-248; Haddad, *Not Quite American?*, p. 25; *See* Smith, p. 168 concerning the FIA's relinquishment of power to the MSA

B. African American Adoption of Islam

Along with the increased presence of Muslims from outside of the United States, there emerged a series of indigenous Black Islamizers**"**[571] in the early twentieth century. At that time, large numbers of African Americans were migrating from the rural South to Northern industrial jobs. Observing spirits broken by discrimination, some early urban black leaders turned to their own interpretations of Islam as a non-white, egalitarian antidote. Although isolated from the greater Muslim *ummah* and inadequately informed about Islamic theology, African American reformers never-the-less interpreted Islam as an empowering religious force for blacks. Although their Muslim movements taught doctrines heretical to traditional Islam, their efforts offered African Americans some opportunities to begin to identify discrimination, claim personal dignity, and demand their full human rights. [572]

Two early black Muslim movements have particular importance. The first, the Moorish Science Temple was founded in Newark, N.J. by Noble Drew Ali in 1913. Born Timothy Drew of North Carolina in 1886, Noble Drew was strongly influenced by Marcus Garvey's Universal Negro Improvement Association which advocated black separatism and a return to Africa. He appears to be the first African American reformer to unite and empower blacks through Asiatic and Islamic referents . Recognizing the black hunger for roots, Drew based the Moorish Science Temple movement on resistance to Anglo-American racial identification and assertion of a romanticized collective origin as Asiatic. He encouraged blacks to reject their slave names and adopt Moorish identities, allowing

[571] The term "Black Islamizers" was coined by Geneive Abdo to identify the early efforts of some African-American leaders to appropriate Islamic dress and symbols for purposes of liberating themselves and their followers from the oppressive vestiges of slavery. *See* Ado, *Mecca and Mainstreet*, p. 77.
[572] *See* Abdo , *Mecca and Mainstreet*, p. 72; Smith, *Islam in America*, p. 78.

them to define their own social potential and revel in a great cultural heritage.[573] As Moors, his followers distinguished themselves from the rest of the black community by donning the fez, growing their beards, and avoiding alcohol or drugs.[574]

Expropriating Muslim symbols, Drew emblazoned the Islamic crescent on temple membership cards, required his followers to face Mecca during prayer, and even wrote his own scripture entitled The Holy Koran of the Moorish Science Temple of America. However, Drew did not teach orthodox Islam. Instead, he incorporated an array of teachings from Islamic, Christian, Freemason, and mythology. His heretical claim to be the prophet of Allah contravened the essential Muslim doctrine that Muhammad was the last messenger of God.[575]

By 1929, Drew had established worship centers in major Northern cities. He also successfully fielded his faith's first national convention.[576] A year later, organization infighting led to the death of a rival and Noble Drew Ali's incarceration. Noble Drew died in prison a few weeks later under mysterious circumstances. His invocation of Islam as a means for African Americans to overcome oppression and achieve independence spawned numerous small, independent black businesses and active public service projects. Drew's followers continue to receive wide civic recognition for advancing the communal social, economic, and moral well-being.[577]

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[573] Smith, *Islam in America*, p. 79; Abdo , *Mecca and Mainstreet*, pp.73; Eck, *A New Religious America*, p. 252.
[574] Eck, *A New Religious America*, pp. 252 – 254; Abdo , *Mecca and Mainstreet*, pp.72-73; Eck, *A New Religious America*, p. 252 – 254; Abdo , *Mecca and Mainstreet*, pp.72-73; Smith, *Islam in America*, pp. 78-79. p. 78-79. Women members distinguished themselves by wearing turbans and long dresses. *See* Smith, *Islam in America*, p. 80.
[575] Abdo , *Mecca and Mainstreet*, pp.73. *See* Smith, *Islam in America*, p. 82.
[576] Eck, *A New Religious America*, pp. 252-254.; Albo, *Mecca and Mainstreet*, pp. 72-73; Smith, *Islam in America*, pp. 78-80.
[577] Smith, *Islam in America*, p. 79.

The second notable African-American Islamic movement was the Nation of Islam. Originally founded in Detroit by a former Moorish Science Temple follower, this group would go on to spawn numerous offshoots which today coexist.[578] On July 4, 1930, shortly after Noble Drew Ali's death, Wallace D. Fard began to preach that he had been sent from Mecca to direct American blacks to their true identity as the lost, Muslim tribe of Shabbaz. As a traveling peddler, Fard began meeting in private homes and in a short time his following was large enough to rent halls, identifying themselves as the Lost-found Nation of Islam in the Wilderness of North America. Fard's ministry lasted only three years, until he was expelled from Detroit for allegedly inciting violence with his racist teachings. During this short time, Fard created an organizational structure that provided membership education and produced a private security force entitled the Fruit of Islam.[579]

Upon Fard's abrupt departure, he was succeeded by Elijah Poole as leader of what became known simply as The Nation of Islam. Poole believed that Fard was divine; sent to displace the white Messiah that Christianity attempted to impose upon blacks. Understanding Fard as the redeemer of African Americans, Elijah Poole began to preach his message. Given a Muslim identity by Fard's followers, the newly named Elijah Muhammad quickly became the acknowledged leader of the group and ultimately was named Chief Minister of Islam. However, many of Elijah Muhammad's teachings were anathema to traditional Islam. In contravention of the *shahada*, he established himself as the messenger of Allah and claimed divine status for Fard. Such claims constitute *shirk* (or the gravest sin) under orthodox Islam, which recognizes no God but Allah and views

[578] Eck, *A New Religious America*, p. 253; Smith, *Islam in America*, p. 79.
[579] Abdo, *Mecca and Mainstreet*, p.76; Smith, *Islam in America*, p. 81; Eck, *A New Religious America*, p. 253;

Muhammad as His final messenger. Despite Islamic insistence on the equality before Allah of all races and all peoples, Elijah Muhammad continued to teach Fard's elaborate mythology under which the white race, because it was created evil and inferior by the errant scientist Yaccub, sought to enslave the morally superior black race. Despite the heterodox nature of these claims, many former followers continue to insist that these teachings were necessary to assist blacks in overcoming the oppressiveness of racial segregation and discovering the self-esteem necessary to discipline their lives so as to achieve spiritual stability and economic viability. Over time, the organization's name was shortened to the Nation of Islam. (NOI).[580]

Understanding blacks as a race battling back from enslavement and segregation, Elijah Muhammad asserted that negroes were not American citizens. Rather, they constituted a community separate from the United States, a Nation within a nation. By establishing a black state, negroes could create a government and a society where whites had no role and therefore, no power. Muhammad encouraged establishment of black-owned businesses and the personal achievement of financial security, both of which he felt essential to political independence. He insisted that his followers "think black, invest black, buy black."[581] At the same time, Elijah Muhammad stressed an ethical code that not only encouraged personal industry, but placed his followers above moral repute. The religious requirements of abstaining from alcohol and drugs, avoidance of gambling,

[580] Smith, *Islam in America*, pp. 82-83; Abdo , *Mecca and Mainstreet*, p.76-77; Eck, *A New Religious America*, pp. 253-255.
[581] Smith, *Islam in America*, p. 85.

strict dietary requirements, emphasis upon education, forbidden intermarriage, and mandatory alms all served to clear the mind and stabilize the community.[582]

Elijah Muhammad was twice jailed over positions counter to American citizenship ideals. He, his Temple Secretary, and Muslim Teachers were first imprisoned by Detroit police in the 1934 after openly rejecting the public school system. Elijah Muhammad's chief criticism was that public schools were improperly educating young blacks into subjugation under the white domination system. Instead, he advocated the NOI's education of their own youth in accordance with their religious tenets. During W. W. II, he was again sent to prison for sedition, treason, and conspiracy. His conviction was based upon his open support for Japan as a non-white nation and his directive that his followers refuse combat.[583]

Elijah Muhammad provided urban blacks with an egalitarian vision and an alternative "national" citizenship which they could embrace in opposition to the "Judeo-Christian nation."[584] In time, certain of his followers would become key leaders in the black struggle to obtain full citizenship and equal liberty in the United States. While Martin Luther King and the Southern Christian Leadership Conference worked toward nonviolent change, members of the Nation of Islam demanded radical social change and

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[582] Smith, *Islam in America*, pp. 82-85 Abdo , *Mecca and Mainstreet*, p.76-77; Eck, *A New Religious America*, p. 253-255. Note that as a result of Elijah Muhammad's imprisonment, the members of the Nation of Islam were convinced that they were being targeted by the judicial system. This elevated the group's standing within African American communities in the big Northern cities. And, Elijah Muhammad's prison experiences led to an active prison ministry and numerous jail-house conversions

[583] Abdo , *Mecca and Mainstreet*, p.77; Smith, *Islam in America*, pp. 84-85; Eck, *A New Religious America*, pp. 254-255. *See* http://www.noi.org/elijah_muhammad_history.htm and http://gale.cengage.com/free_resources/bhm/bio/muhammad_e.htm accessed on October 22, 2007.

[584] Smith, *Islam in America*, pp. 83-85. Martin Marty, Modern American Religion (Chicago : University of Chicago Press 1986), pp. 294-296; Stephen Prothero, "Introduction," *A Nation of Religions* (Chapel Hill : University of North Carolina Press 2006), pp. 1-19, at pp. 2-3. Both authors allude to Will Herberg's triple-mainstream set forth in his book: *Protestant-Catholic-Jew* (New York: Doubleday 1955), Will Herberg, *Protestant, Catholic, Jew* (Garden City, N.Y. : Doubleday 1955).

vehemently castigated white society for its reticence to recognize African Americans' constitutional rights.[585]

Converting to the NOI in prison, Malcolm Little would emerge from serving a seven-year sentence in Massachusetts Norfolk Prison to eventually become the National Representative of the Honorable Elijah Muhammad. As Malcolm X, he traveled nationally and internationally addressing the plight of blacks in America and the solutions offered to them by the Nation of Islam. As conflict with Elijah Muhammad's leadership increased, Malcolm left for the hajj in Mecca.[586] There, he experienced "the correct way that Muslims pray" and "a spirit of unity and brotherhood" which would lead him to say that "The true Islam has shown me that a blanket indictment of all white people is as wrong as when whites make blanket indictments against Blacks."[587] Sharing this innovative message of tolerance, he was gunned down less than nine months later while addressing a crowd at the Audubon Ballroom in New York. Three NOI members were convicted of murder even though it later became clear that only one was guilty. Neither suspicions of NOI leadership's involvement nor FBI arrangement have ever been substantiated.[588]

Elijah Muhammad would lead the NOI until his death in 1975. Despite being in continuous trouble for questioning the Nation's basic doctrines, Wallace Deen Muhammad succeeded his father as head of the organization. Over a period of years, W.D. Mohammad cautiously dismantled the NOI's ideology and restructured its

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[585] Taylor Branch, *Parting of the Waters* (New York: Touchstone Books 1988), p. 320. *See also* Taylor Branch, *Pillar of Fire* (New York: Touchstone Books 1999), pp. 3-20; Smith, *Islam in America*, pp. 82-85
[586] Abdo , *Mecca and Mainstreet*, pp.78-79; Smith, *Islam in America*, pp. 85-89; Eck, *A New Religious America*, pp. 254-255.
[587] Malcolm X, "Letter from Mecca" quoted in Abdo , *Mecca and Mainstreet*, p. 79.
[588] Mark Jacobson, "The Man Who Didn't Shoot Malcolm X," *New York Magazine* (Oct. 8, 2007), pp. 36-44, at 44. *See also*. Smith, *Islam in America*, pp. 88-89; Abdo , *Mecca and Mainstreet*, p.78-79.

organization moving it toward orthodox Sunni Islam. Studied in the Qu'ran and experienced in the hajj, W.D. underscored the humanity of both Fard and his messenger, Elijah Muhammad. He moved traditional Islamic practices to the center of the movement. Also, he rebutted the NOI's central doctrine of black superiority in favor of egalitarianism, encouraging whites to join the fold. Still, his following has remained largely African American.[589]

W.D. Mohammad interpreted Islam as a spiritual force uniting peoples rather than as a political tool to attain separatist nationalistic goals. In time, the Nation of Islam's new leader ended all demands for a separate black state. Instead, W.D. Mohammad called members to acknowledge their American citizenship and respect the ideals of the U.S. Constitution. After a succession of name changes, the NOI became known as the American Muslim Mission in 1980. By this time, W.D. had officially changed his name to Warith Deen Mohammad (meaning in Arabic "the inheritor of the religion of the Prophet Muhammad") and resigned direct leadership, having decentralized authority in favor of an elected six member council of imams.[590]

As of 1985, W.D. had completed the decentralization of NOI authority and mandated that his followers be known simply as Muslims, members of the global Sunni Islamic *ummah*. Only within the last several years has he complied with his followers request to refer to them as the Muslim American Society.[591] In the early 1990's, it was estimated that his followers numbered approximately two million.[592] Today, W.D. Mohammad

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[589] Smith, *Islam in America*, pp. 90-92; Abdo, *Mecca and Mainstreet*, pp.79-81; Stephen R. Prothero ,"Islam," *The Encyclopedia of American Religious History*, Vol. I, E.L. Queen, S. R. Prothero, & G.H. Shattuck, Jr., eds. (New York: Proseworks 1996), pp. 318-321, at 320-321.
[590] Smith, *Islam in America*, pp. 92-93.
[591] Smith, *Islam in America*, pp. 92-93.; Prothero, p. 321.
[592] Taylor Branch, *Pillar of Fire* (New York: Simon & Schuster 1998), p. 605.

exercises little control over the approximately two hundred *masjids* tied to his network, but remains their most respected spiritual guide.[593] He has become widely recognized as the contemporary *mujaddid* (renewer of the faith) whose vision unites American Muslims and whose authority includes certification of all Islamic American who wish to undertake the *hajj* pilgrimage to Mecca. For these reasons, it was Imam Warith Deen Mohammad whom was chosen in 1990 to be the first Muslim to open the U.S. Senate in prayer.[594]

W.D. Mohammad's traditional Sunni message and unifying vision did not sit well with many of his late father's lieutenants. Many of these men went on to propagate Islamic sounding, exclusivist faiths of their own, including *Dar ul-Islam* Movement of Jamil al-Amin (f/k/a H. "Rap" Brown), Five Per-centers of Clarence Jowars, and the caliphate of Emmanuel Muhammad in Baltimore.[595] By far the most vocal critic of W.D. Mohammad has been Lois Farrakhan. Displeased with the NOI's new direction, in 1978 Farrakhan broke with W.D. Mohammad to resurrect the black separatist organization of Elijah Muhammad.[596]

Resurrected by Farrakhan, the new Nation of Islam aims to establish an independent black nation for the betterment of the black community. Separation and self-government, not integration are presented as the answer to black advancement. The new NOI has not lured many from W.D. Mohammad's movement, remaining a small organization that has had to rely upon new converts for membership. In more recent years, Farrakhan has attempted to bring his organization into closer connection with orthodox Islam and the

[593] Abdo, *Mecca and Mainstreet*, pp.79-81.
[594] Smith, *Islam in America*, pp. 93.
[595] Smith, *Islam in America*, pp. 97; 99; Abdu, *Mecca and Maintreet*, p. 115; Kambiz GhaneaBassiri, Competing Visions of Islam in the United States (Westport, CT: Greenwood Press 1997), pp. 166-171.
[596] Smith, *Islam in America*, pp. 93-94; Abdu, *Mecca and Maintreet*, pp.. 80, 91. *See* Branch, *Pillar of Fire*, p. 605.

Muslim communities of the Middle East and Africa. NOI membership numbers 10,000, representing only one of every two hundred American born Muslims.[597]

C. Black Muslims Contribute to Civil Rights Success

The year 1965 not only witnessed the assassination of Malcolm X, but two key pieces of federal legislation which would assist Muslim Americans in finally achieving the full legal rights of American citizenship. On August 6, 1965, President Lyndon Johnson signed the Voting Rights Act into law. Adopted one year after the Civil Rights Act, it is generally considered the most effective piece of civil rights legislation.[598] The Voting Rights Act codified the Fifteenth Amendment guarantee that no person shall be denied the right to vote in the United States based upon race or color.[599]

Two months later, President Johnson would sign into law the Immigration and Nationality Act Amendments of 1965.[600] Popularly referred to as the Hart-Celler Bill, this amendment not only repealed the National Origins Act of 1924[601] but established a

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[597] Abdu, *Mecca and Maintreet*, p. 80, 91, 100; Smith, *Islam in America*, pp. 93-94. *See* Charles Bierbauer, "The Million Man March: Its Goal More Widely Accepted than Its Leader," posted on 10/17/1995 on http://www.cnn.com/US/9510/megamarch/10-17/notebook/index.html accessed on 10/23/07.

[598] Civil Rights Act of 1964, Pub. L. No. 880353, 78 Stat. 241 (1964).

[599] Voting Rights Act of 1965, 42 U.S.C. §1973, *et. seq.* (1965).

[600] Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (amending certain portions of the 1952 Act, 8 U.S.C. § § 1101-1557 (1952). *See* Abdo, p. 61.
Note that under the Naturalization Act of 1790, 1 Stat. 103 (1790), only "free white persons" could become naturalized citizens. Although repealed by the Act of January 19, 1795, the racial restrictions were renacted, along with most of its remaining provisions. Upon ratification of the 14th Amendment, the criteria were amended to include persons of "African nativity and descent," Act of July 14, 1870, ch. 255, s 7, 16 Stat. 254. Unfortunately, racial restrictions on naturalized citizenship continued for persons of Japanese ancestry until the McCarran-Walter Act of 1952, Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952). A history of the cases addressing this racial prerequisite for citizenship is given in Ian F. Haney Lopez, White By Law: The Legal Construction of Race (New York: New York University Press 1996). *See* Natsu Taylor Saito, "Symbolism Under Seige: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists" 8 Asian L.J. 1 (May 2001), p. 31, ftn, 13.

[601] Immigration Act of 1924, 68 Cong. Ch. 190, 43 Stat. 153. (1924)(repealed 1952). *See* ftn. p.117, 8 above.

liberal immigration policy that purported to put all immigrants on equal footing. Explicitly promoted as an extension of the civil rights legislation, it eliminated national origin quotas favoring Northern Europeans.[602] Instead, the law substituted new criteria of family reunification and needed skills.[603] Neither the bill's proponents admitted nor congressional voters foresaw the tremendous impact it would have upon immigration policy and numbers.[604] The mass influx rivaled the previous early 20th century immigration which had spawned the original legal restraints. The largest contingents came from the two regions formerly bearing the greatest restrictions – Latin America and

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[602] *See* http://www.cis.org/articles/1995/back395.html accessed on 11/2/02 which indicates that in the Congressional Debates over the Hart-Cellar Bill, several Representatives made direct reference to the Civil Rights Act, appealing for the extension of its effect through amendment of existing immigration laws to end the discriminatory quota system.

Rep. Philip Burton (D-CA) said in Congress: "*Just as we sought to eliminate discrimination in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration to this nation composed of the descendants of immigrants.*" (*Congressional Record*, Aug. 25, 1965, p. 21783.)

Rep. Robert Sweeney (D-OH) said: "*Mr. Chairman, I would consider the amendments to the Immigration and Nationality Act to be as important as the landmark legislation of this Congress*

relating to the Civil Rights Act. The central purpose of the administration's immigration bill is to once again undo discrimination and to revise the standards by which we choose potential Americans in order to be fairer to them and which will certainly be more beneficial to us." (*Congressional Record*, Aug. 25, 1965, p. 21765.)

[603] http://www.oriole.umd.edu/~mddlmddl/791/legal/html/immi1900.html accessed on 11/2/2007. Noah Pickus, *True Faith and Allegiance* (Princeton, N. J.: Princeton Univ. Press 2005), p. 129.

At the time of the signing of the bill into law, President Lyndon Johnson remarked about the previous U.S. immigration policy:

> "*This system violates the basic principle of American democracy -- the principle that values and rewards each man on the basis of his merit as a man. It has been un-American in the highest sense, because it has been untrue to the faith that brought thousands to these shores even before we were a country.*"

Johnson, Lyndon B., *Public Papers of the Presidents of the United States*, U.S. Government Printing Office, Washington, D.C., 1966, pp. 1037-1040 quoted at http://www.cis.org/articles/1995/back395.html accessed on 11/5/07.

[604] From 1960 to the year 2000, immigrant numbers had risen from 75 million to 175 million. Abdo, p. 63.

Asia.[605] Many of the Asian newcomers were Muslim. In fact, the increase in Islamic émigrés would prove to be the most profound change to the American social scene sine the easing of immigration restrictions.[606]

D. Rising Muslim Immigration to the United States

After W.W. II, the United States had admitted thousands of Arab and South Asian university students for education in the sciences and technology. It was a mutually beneficial relationship which provided Third World students with the technical education needed to emerge as potential leaders of their native societies. In return, the United States not only gained foreign influence but indoctrinated allies in its fight against Communism. The U.S. also was able to propagate resource suppliers and ready consumers for its expanding capitalist economy. Thus, few questioned the students' founding of the Muslim Students Association (MSA) in 1963, which would assist them in navigating American culture and negotiating U.S. society in a manner faithful to their Islamic beliefs. Chapters of the MSA were openly established by these students at many of the various colleges and universities which they attended. Few of these Muslim students were born in the U.S. and most planned to return home upon graduation to modernize their societies.[607]

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[605] http://www.cis.org/articles/1995/back395.html accessed on 11/5/07. In the first decade of the 20th Century, immigration reached 8.7 million but declined steadily averaging only 195,000 per year from 1921 through 1970. After the change in immigration laws in 1965, the number of immigrants began to grow, changing from 250,000 per year to today's level of over 1,000,000 per year. Since passage of the 1965 immigration act, more than 18 million legal immigrants have entered the U.S. while countless more have come illegally. *See* http://www.susps.org/overview/numbers.html accessed on 11/5/07 and http://www.cis.org/articles/1995/back395.html accessed on 11/5/07. *See also* http://www.census.gov/population/www/documentation/twps0081/twps0081.html accessed on 11/5/07.

[606] *See* Abdo, p. 139; Haddad, *Not Quite American?*, p. 13.

[607] Muhammad,, *Muslims in America*, p. 64; ; Abdo, *Mecca and Mainstreet*, pp. 8, 81, 197; Smith, *Islam in America*, pp. 168-170; Eck, p. 288. *But see* Paul M. Barrett, *American Islam: The Struggle for the Soul of a*

With the 1965 change in immigration policies and vast expansion in American university facilities, many of these students chose to stay becoming professors and eventually, citizens. At the same time, the growing diversity in Muslim student population and Islamic immigrants assured the pluralism of both the United States and the American Muslim community. Steeped in Islamic tradition and university education, it was almost inevitable that the new Muslim immigrants would come into conflict with the growing number of African American converts.[608] Immigrant numbers soon overwhelmed those of indigenous American Muslims. The Muslim émigrés' religious knowledge, secular education, ready resources, organizational skills and middle class status translated into control of the American Muslim movement.[609] Their interests and *zakat* were concentrated upon their homeland rather than American concerns.[610]

International crises repeatedly propelled Islam and its followers into the American consciousness. With each event, American Muslims became more opposed to U.S. foreign policy and more concerned about their place in domestic society. After the fatal Palestinian hostage taking of Israeli athletes at the Munich Olympics, the Nixon

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Religion (NY: Farrar, Straus and Giroux 2007), p. 236 – Those who founded the MSA were not only the "vanguard of a highly educated and prosperous segment of the American Muslim population," but also had an Islamic fundamentalist orientation fueled by Saudi money. Although moderating in the 1980's, new waves of student immigrants continually renewed the extremism. Some Muslim students who arrive with hostile views toward the U.S. have had their positions reinforced in the MSA and adopted by Muslim students born in the U.S.

[608] Note that since the 1970's, significant numbers of African Americans have been converting to Islam. Their reason for doing so includes Islam's theological insistence of equal rights and social justice. Abdo, p. 97. *See also* Abdo, pp. 9, 97; Smith, *Islam in America*, p,167.

[609] Abdo, pp. 91.

[610] *Zakat* is the Arabic word for "purity" and is the technical name for the mandatory alms tax. It represents the fourth responsibility of worship (known as *sadaqah*) under the 'five pillars of Islam," which structure the life of every Muslim. Because it is obligatory for Muslims, it is not considered charity, because the recipient is not in any way beholden to the giver. Mustansir Mir, Dictionary of Qur'anic Terms and Concepts (New York: Garland Publishing, Inc. 1982), p. 221. *See also* Yvonne Yazbeck Haddad and Adair T. Lummis, *Islamic Values in the United States* (New York: Oxford University Press 1987), pp. 16-17. Haddad, *Muslims on the American Path?*, pp. 38-39; Abdo, pp 81- 82; Ihsan Bagby, "Isolate, Insulate, Assimilate: Attitudes of Mosque Leaders toward America, *A Nation of Religion: The Politics of Pluralism in Multireligious America* (Chapel Hill, N.C.: University of North Carolina Press 2006), pp. 23-32, at p. 26.

Administration directly allied the FBI with Israeli intelligence to spy upon Arab American organizations under the code-name, Operation Boulder.[611] Relative inaction in the face of Pakistani strife and the creation of Bangladesh revealed American disinterest in Muslim Asian affairs. The 1979 Iranian Revolution and Hostage Crisis raised new concerns about radical Islam. The official freezing of Iranian assets directly affected a number of Iranian students and created anxiety for many in the Muslim community.[612]

Increasingly anxious about their domestic standing, Muslim citizens began to actively shape their own American experience through associations and participation. Most important for Muslim American citizens, organizations have emerged which raise civic awareness, foster participation, and facilitate political engagement of its members. Created to counter Zionist influence after the Israeli-Arab conflicts, Muslim political organizations were formed initially by Arabs.[613] Such organizations included the National Association of Arab Americans (NAAA founded 1972), the American-Arab Anti-Discrimination Committee (1982), and the Arab American Institute (AAI founded 1984).[614] Often, these organizations suffered internal conflict as the various Middle

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[611] Haddad, *Not Quite American?* pp. 20-21.

[612] U.S. House of Representatives, Committee on Banking, Finance, and Urban Affairs, 97th Congress, 1st Sess "Iran: The Financial Aspects of the Hostage Settlement," (Washington : U.S. G.P.O. 1981); Naraghi Ehsan, *From Palace to Prison: Inside the Iranian Revolution* (London: I.B. Tauris & Co., Ltd. 1994), p. 274. *See* Smith, *Islam in America*, pp. 47-49, 53.

[613] Haddad, *Not Quite American?*, p. 19.

[614] Haddad, *Not Quite American?*, p. 22. However, it must be noted that there were some earlier Muslim American associations with political goals which were founded earlier. One example is the Islamic Circle of North America (ICNA) was founded in 1971 and identifies among its goals to:

> "oppose immorality and oppression in all forms, and support efforts for civil liberties and socio-economic justice in the society; strengthen the bond of humanity by serving all those in need anywhere in the world, with special focus on our neighborhood across North America; and "cooperate with other organizations for the implementation of this program and unity in the *ummah* [Muslim community]."

See http://www.icna.org/icna/goals-objectives/goal-program.html accessed on 11/8/07.

Eastern nationals vied to make the political issues of their homeland the central organizational concern.[615]

In the 1980's, the founders of the Muslim Student Association decided to create a wider umbrella organization to coordinate Muslim actions and oversee emerging Islamic groups. The Islamic Society of North America, which they formed in 1982, continues to focus on pressing Muslim social and political concerns.[616] Under its wings, a plethora of Islamic interest groups now operate. These organizations address such diverse Islamic needs as civic service by the Muslim Community Association and the Muslim Youth of North America, financial matters through the North American Islamic Trust, education under the Islamic Teaching Center, business and commerce by the Muslim Businessmen and Professionals, and science through the American Muslim Scientists and Engineers.[617]

When Arab associations garnered adverse publicity, it was determined that Islam might provide a more effective rallying point. This became even more necessary with the advent of the First Gulf War and the resultant pull of Saudi funding for U.S. based organizations, including the Muslim Students Association. So, in the late 1980's and 1990's, American Muslims increasingly founded Islamic organizations which united their cause, religiously dignified their message, and garnered First Amendment protections. Forced to find their own financial and organizational supports, these American Muslim

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[615] Unfortunately, the success of these organizations has been limited by domestic fears of foreign interference as well as the popular prejudice bred by anti-Americanism in the Middle East.. Evidence of American fear of Arabs exists in the wake of the Munich Olympics hostage crisis in the form of involving Nixon's Operation Boulder (domestic spying on Arab Americans in cooperation with Israeli intelligence), revelations concerning U.S. Government's consideration of Arab internment, and ABSCAM (involving FBI agents posing as Arabs in an attempt to expose corrupt Congress persons.) *See* Haddad, *Not Quite American?,* pp. 21-22. Rising anti-American sentiment in the Middle East can be seen in the Iranian student movement and subsequent Islamic revolution as well as in the turn to the Soviet Union. ***See*** Aminah Beverly McCloud, *Transnational Muslims* (Gainesville : University Press of Florida 2006**), p. 95.;** Smith, *Islam in America*, p. 48.

[616] Smith, pp 132; 170-171.

[617] Smith, pp. 169-170.

associations gained independence from foreign influence and increasingly engaged the U.S. democratic process.[618] The large, active organizations which they formed during this time included the Muslim Public Affairs Council (MPAC founded in 1988), the American Muslim Council (AMC founded in 1990), the American Muslim Alliance (AMA founded in 1994), and the Council on American Islamic Relations (CAIR founded in 1994).[619] Again, the groups' growing influence was hampered both internally by immigrant/ indigenous divisions and externally by growing caution among political advisors about accepting Muslim contributions. With the advent of the Clinton Administration, Muslim citizens did begin to experience symbolic signs of inclusion including the First Lady's 1996 hosting of the first *iftar* dinner at the State Department, invitations to public events, and occasional meetings with policymakers.

By the year 2000, Muslim American citizens were determined to make their presence known during the presidential election.[620] Based upon the Clinton administration's foreign policy and his own inattention, Gore lost the American Islamic vote. More attune to their voice; George W. Bush was rewarded with their support leading to a contested election victory. Unfortunately, the events of September 11 would radically alter both Bush's foreign policy and Muslim American's growing confidence concerning their participatory impact upon their adopted country.[621]

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[618] Haddad, "The Dynamics of Islamic Identity in North America," *Muslims on the Americanization Path?*, Y. Haddad & J. Esposito (New York: Oxford University Press 1998), pp.19-46, at p. 31.
[619] Bagby, "Isolate, Insulate, Assimilate," pp.23-42, at p. 37; Haddad, *Not Quite American?*, p. 26; Eck, *A New Religious America*, pp.268-269, 359-363.
[620] Eck, *A New Religious America*, p. 363.
[621] Haddad, *Not Quite American?*, p. 41.

E. Uneasy Citizenship in a Transnational Age

Along with all other immigrants and people of color, Muslim Americans have faced unique challenges in achieving full American citizenship in the new transnational age. Despite being a "nation of immigrants," the hallmarks of American citizenship always have been conformity and assimilation with dominant, white-Protestant expectations. Newcomers are expected to leave old world ways behind and reject their native language so as to wholeheartedly adopt the ways of this country.[622] And yet, most immigrants to America have looked backwards and yearned for some aspects of their former lives even while escaping persecution. Until the late-twentieth century, it was difficult to receive word about their homeland much less maintain domestic ties. Today, the realities of global communications, mass media, and air travel have allowed persons to maintain a presence in both worlds. New immigrants can receive constant updates about their former homeland in their native language via satellite TV. Also, they can enjoy instantaneous communication with loved ones via the internet and cell phone. Where once visits back to one's country of origin were difficult and cost prohibitive, today air travel permits return within a matter of hours.[623]

In championing religious liberty, few Americans have acknowledged the unspoken expectations that faith traditions suffer continual societal pressure to conform to the mores of this country.[624] However, most people of faith have problems with U.S. public morals. In a society that flaunts violence, sexuality, and power, there is plenty of room

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622 Jill Norgen and Serena Nanda, *American Cultural Pluralism and Law* (Westport, CT: Praeger 3d ed., 2006), pp. xvi-, xvii-xviii; McCloud, *Transnational Muslims*, pp. 2, 11, 123; Haddad, *Not Quite American?*, p.4.

623 Gabriele Marranci, *Jihad Beyond Islam* (New York: Berg 2006), pp. 120, 125; McCloud, *Transnational Muslims*, pp. 1,

624 *See* Abdo, *Mecca and Main Street*, pp. 26, 28. 33

for concern. Domestic policy decisions too often favor the wealthy and powerful at the expense of the poor and weak. Racism remains a constant challenge. And, too often foreign affairs favor the path advocated by influential special interests rather than ordinary citizen voices. Still, all acknowledge that the legal guarantee of freedom of conscience permits the right to openly practice one's beliefs in a manner true to personal understandings so long as no other is harmed. All acknowledge that this is a far greater liberty than offered in any other land.

While Muslims have made increasing efforts to unite and lobby for change, they have experienced outright attacks from opposition groups and at best, superficial acknowledgment from public officials.[625] As Middle Eastern, Asian, and African sentiments have become increasingly anti-American, they have been disheartened by biased media coverage, thwarted efforts to advise government officials, growing public misunderstanding about U.S. policy choices, and the ire of foreign reaction.[626] These experiences have made it easier to rely on satellite TV, Muslim news services, and instantaneous communication with the homeland for accurate news and emotional support. It also has served to undermine confidence in the sincerity of the American ideals to which one pledged allegiance during the citizenship induction ceremony.[627]

Islamic faith causes Muslim Americans discomfort with modern American social morals. Their religion requires a moral way of life which stresses modesty, chastity before marriage, almsgiving, and charity. Televisions constantly air images of brutal violence as well as provocatively clothed youth engaging in explicit sexual acts.

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[625] Haddad, *Not Quite American?*, pp. 46-48
[626] McCloud, *Transnational Muslims*, pp. 6; Haddad, *Not Quite American?*, pp. 48 – 49; Abdo, *Mecca and Main Street*, pp. 144-145.
[627] Marranci, *Jihad Beyond Islam*, p 74, 78, 82-86; McCloud, *Transnational Muslims*, pp. 4-5, 9 ; Abdo, *Mecca and Main Street*, pp. 144-145.

Computers make pornography readily available while radios broadcast seamy lyrics. Advertising incites superficial materialism, and shopping centers satiate rampant consumption.

Most faithful Muslims refrain from total assimilation into the U.S. way of life. Rather, they prefer to guardedly integrate their communal values into the larger society. Their choice has been necessitated by the centuries-old Islamic distinction between *dar al'Islam* ("land of Islam") and *dar al' harb* ("land of war").[628] Traditionally, Islamic jurists advised Muslims that it was easier to live a faithful life within lands under Muslim rule. There, the majority submitted to the *shari'a* (Islamic law) and therefore, society was judged civilized.[629] All remaining lands were *dar al'harb* (sometimes referred to as *dar al'kaf* , meaning "land of apostasy"). In these external environments, Islam was not dominant and thus, most of the community lived without proper (meaning Islamic) law or adequate spiritual (again meaning Islamic) direction. Therefore, the scholars admonished these places as consigned to ignorance unless converted to Muslim rule. If unable to win the new territory for Islam, the *ulama* advised Muslims either to migrate to Islamic lands (*hijra*) or struggle to convert the populace (*jihad*).[630]

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[628] This distinction can be attributed to Islam's lack of the separation between church and state. For this reason, the caliphs (rulers) relied upon the *ulama* (religious scholars) to justify their political actions. Brown, *Religion and the State: The Muslim Approach to Politics*, p. 46-47. Despite the Qur'an's universal message and holistic vision, the *ulama* (religious scholars) justified the *caliphs'* territorial expansions by developing a dualistic representation of the world. Through their interpretations, they had centuries ago reconciled the scriptural message against forced conversions of individuals with the political ambition of ruling the non-Muslim states. Granting non-Muslims special *dhimma* status, the caliph was able to meet the *shari'a* prohibition against forced conversion while meeting its obligation to re-order the world for Allah. Brown, p. 46-47; Marranci, p. 25. *See* Sura 2:256:L 'Let there be no compulsion in religion" and Sura 3:104: "Let there arise out of you a band of people inviting to all that is good, enjoying what is right, and forbidding what is wrong; they are the ones to attain felicity."

[629] Marranci, pp.12, 25; Smith, p. 178; Abdo, pp. 12-13.

[630] Marranci, p. 25-26; Brown, p. 55-57; An-Na'im, p. 150. Note that jihad can be interpreted as a spiritual struggle as well as active fighting.

Such rigid interpretations of Islamic teachings always have presented a dilemma for practicing Muslims who wish to integrate with American culture.[631] America's earlier prairie Muslims were cut off from their homelands and lacked access to trained religious leaders. Yet, they were aware of the progressive *fatwas* of both Rashid Rida and Muhammad Abduh, Egypt's Shaykh al-Azar. Rida not only approved Muslim residence in non-Islamic lands, but supported his decree with the medieval jurist, al-Muwardi's report of the Prophet's approval of Muslim settlement in lands allowing the free practice of Islam.[632] Further, Muhammad Abduh had sanctioned Muslim collaboration with non-Muslims benefiting the *umma*, including the consumption of meat slaughtered by the People of the Book.[633] These teachings liberated them to practice a version of their faith within the cultural confines of American society. At the same time, these Islamic concessions made it easier for them to intermarry and gradually assimilate into U.S. culture. Only those within strong ethnic communities were able to maintain some semblance of Islamic identity, but it was often as closely tied to the preservation of their cultural customs as to their religious tradition. [634]

Islam is not a faith with an organized ecclesial structure; currently, about 80% of Muslims do not affiliate with a mosque.[635] Rather, they turn to religious teachers who inspire them. Great deference is paid to the opinions of Muslim scholars who have studied the Qur'an, Sunna, and Haddiths as well as Islamic jurists. Muslim regard for

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[631] Smith, *Islam in America*, p. 179
[632] Khaled Abou El Fadl, "Striking a Balance: Legal Discourse on Muslim Minorities," *Muslims on the Americanization Path?*, Y. Haddad & J. Le Esposito (New York: Oxford University Press 2000), p. 52 cited in Haddad, *Not Quite American?*, p. 29, ftn. 57.
[633] "Isti'anat al-Muslimin bi'l-Kuffar waAhl al-Bid's wa al-Ahwa'," in Muhammad 'Amara, al-A'mal a-Kamila lil'l-Imam Muhammad 'Abdu: al-Kitabat al-Siyasiyya (Cair: al-Mu'assa al-'Arabiyya li'l-Dirasat wa'l-ashr 1972), pp. 708-715 cited in Haddad, *Not Quite American?*, p. 29, ftn. 46.
[634] Abdo, p. 72; Smith, p. 55.
[635] Haddad, *Not Quite American?*, pp. 18, 33.

chosen teachers is even more pronounced in the United States, where both immigrant and indigenous Muslims are attempting to live out their faith in a secular nation. However, the lack of ecclesial structure means that there are very few checks on an imam's authority. So, a teacher who attracts followers has open license to interpret the faith.[636] As official centers for Muslim instruction have only recently been established in the U.S. and have not yet gained Islamic credibility, most of America's imams have come from foreign countries.[637] Many times, the culture and perspective of the imam's country of origin affects his opinions and advice concerning his followers' lives in the U.S.[638] While Muslim American leaders have formed *shura* councils**,** universities, and institutes in an attempt to provide Islamic counsel appropriate for the U.S. context, there remain imams with American constituencies who rail against the United States and demonize the American lifestyle.[639]

Post-1965 immigrants hailed from more diverse origins and were equipped with technological advances allowing them access to a wider range of Islamic teachers. As

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[636] Abdo, pp. 19-20. This is particularly true in the United States where there is not yet a unified Muslim culture nor a juridical school favored by the majority of the Islamic community. In Islam, the individual Muslim is given the responsibility to decide which religious scholars to follow. Thus, it is inevitable that socio-political and cultural factors will influence the believer's relationship to the Qur'an. Haddad, *Not Quite American?*, p. 19; Marranci, p. 7; Haddad, *Not Quite American?*, pp. 28-29. As a result, in 2001 Sheikh Hamza Yusuf complained, "The Muslims of today are perhaps the most disunited and confused generation of Muslims in Islam's history." Quoted in Abdo, p. 20.

[637] Safi, "Progressive Islam in America, *A National of Religion* , p. 47. In the United States, there is no Islamic educational institution that resembles the al Azhar (meaning "the shining one in Arabic"), established in Cairo in 970 A.D. For this reason and the fact that fluency in Arabic is necessary to properly interpret the Qur'an, most of America's imams (estimated to number 200) were born in the Middle East or Africa, and were educated at respected Arab institutions (like al Azhar). While indigenous Muslim leaders insist that only American trained imams can properly interpret Islamic teachings within the American context, the Muslim world questions whether those few American-educated imams are qualified to issue sound religious opinions. Abdo, pp.. 20-21.

[638] Abdo, pp. , pp. 22, 104.

[639] Marranci, pp. 59-62; Abdo, pp. 20-21; Smith, p. 172. Note that a *shura* council is a distinguished group of imams who are given the authority to consult together and issue official Islamic decrees (*fatwas*) interpreting and applying the Qur'an, Sunna, Haddith, and *shari'a* (Islamic law) to modern life for the Islamic community. *See* Smith, *Islam in America*, p. 217. For a detailed explanation, see Abdullahi Ahmed An-Na'im, Toward an Islamic Reformation (New York: Syracuse University Press 1990), pp. 78-81.

with their prairie predecessors, the newcomers often inadvertently confused their cultural ways with their religious faith. Unfortunately, many of their imams did the same.[640] Fundamentalists like Pakistan's Mawlana Abu al-A'la al-Mawdudi and Egypt's Sayyid Qutb warned Muslims against succumbing to Western nationalism.[641] Instead, they advocated Islamic resistance to non-Muslim political systems. They urged Muslims to reject Western citizenship and to embrace the Islamic dream of a worldwide *umma* (the theological idealization of the unified Muslim faith community). Along with North African Ali Kettani and others, Qutb began encouraging Muslims to spread their Islamic message with the aim of saving America.[642] However, those Muslim Americans who have adopted the orthodox view of the U.S. as a *kafir* ("infidel") nation tend to feel a pronounced uneasiness and a great deal of ambivalence toward American society. [643] For this reason, they often isolate or insulate themselves within their own communities, seeking to avoid contamination by the immorality of American society. Some refrain from any interaction with American society, while others adamantly engage in challenging it. [644] According to the comprehensive survey entitled "Mosque in America: A National Study of 2000 (MIA)", Ihsan Bagby found that only the mosque leaders who "strongly agree" that America is immoral are likely to reject participation in American

[640] Safi, "Progressive Islam in America," *A Nation of Religions*, p. 48.
[641] *See* Haddad, *Not Quite American?*, pp. 18, 30-31. Mawlana Abu al-A'la al-Mawdudi,founder of Jama'ati Islami, developed his ideas during the struggle to create the Islamic state of Pakistan. Sayyid Qutb, ideologue of Egypt's Muslim Brotherhood, was influenced by his reaction to racism as well as the pro-Israeli sentiment, anti-Arab expression, and anti-Muslim propaganda which he experienced during his residence in U.S. from 1949-1951.
[642] Haddad, *Not Quite American?*, pp. 29-31.
[643] Smith, *Islam in America*, p. 178; Haddad, *Not Quite American?*, pp. 31-32.
[644] Bagby, "Isolate, Insulate, Assimilate," pp.. 24, 41; Smith, *Islam in America*, p. 178.

society. Although a very small group (less than 10% of mosques), they prefer to reject all contact and isolate themselves from others.[645]

More progressive Muslims have listened to different voices and actively engaged U.S. society. At first, liberal Muslims embraced modernity seeking to conform their Islamic beliefs to the pursuit of Western advancement. Many shunned association with mosques, believing that they were better equipped than foreign imams to interpret their Muslim faith in their new American context.[646] When the 1979 Iranian Revolution sparked adverse public sentiment, these immigrants helped to moderate Islamic revivalism in the U.S. Rejecting the authority of Khomeini as they had rejected the traditional Salafists, more liberal Muslims instead embraced the teachings of Sudanese Hassan Turabi and Tunisian Rashid Ghannushi. Traveling to the United States, these Islamic scholars spoke before huge crowds of American Muslims identifying the United States alternatively as *dar al-solh* ("the abode of treaty"), *dar al-da'wa* ("abode of preaching") or *dar maftuha* ("an open country").[647]

These teachers opened a whole new way for American Muslims to understand American society and their place in it. Suddenly, Muslim Americans were being urged to trust the message of Islam and take it to their fellow country-persons. Rather than shunning U.S. society, they were urged to participate as good citizens to make their new homeland a better place. Ghannushi in particular reminded Muslims that they were freer in the United States to practice, debate, develop, and propagate their faith than in any

[645] Bagby, "Isolate, Insulate, Assimilate," p. 29.
[646] Haddad, *Not Quite American?*, p. 33; Safi, "Progressive Islam in America," *A Nation of Religions*, p. 44-46 .
[647] Haddad, *Not Quite American?*, p. 32.

Islamic nation.[648] Based upon this impetus, liberal American Muslims had begun to establish Islamic organizations and build coalitions with diverse, but like-minded groups. [649] By the 1990's, it was clear that the debate internal to the American Muslim community had shifted from rejection and isolation to issues of acceptance of life in the U.S. and maintenance of their Islamic faith while living as American citizens.[650]

Equipped with new interpretations, the second generation of American Muslims began to develop a more progressive Islam, calling upon Islamic principles of human rights and equal dignity to address issues that their parents often ignored.[651] With time, the new generation began to openly protest the American foreign policy makers, question the motives of nationalism, and challenge inequalities of resource distribution. Based upon Islamic principles and modern scholarship, young progressive Muslims have been advocating human rights, democratic freedoms, and universal justice. Attempting to apply the social ideals of the Qur'an and Islamic teaching to contemporary reality, progressive Muslims have engaged the wider American public.

Often rejecting the liberal stance and centralized approach of their parents' American Muslim organizations, they seek to spread their message directly through the Internet.[652] Critical of nationalism, the new generation of Progressive American Muslims does not so much embrace U.S. citizenship as identify themselves as members of the worldwide

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[648] Haddad, *Not Quite American?*, p. 32.

[649] Mohamed Nimer, "Muslims in American Public Life," Muslims in the West: From Sojourners to Citizens, Y. Haddad, ed. (Oxford, UK: Oxford University Press 2002), pp. 169-185, at pp. 171-172, 176; Haddad, Not Quite American?, p. 33; Smith, p. 186.

[650] Haddad, Not Quite American?, p. 38. Haddad quotes Salam al-Marayati , a speaker at the 1993 conference for North American Association of Muslim Professionals and Scholars, to say, "We must be Muslims, offer Islamic values, and be American citizens all in one."

[651] Haddad, *Not Quite American?*, p. 33; Safi, "Progressive Islam in America," *A Nation of Religions*, p. 44 -46 . *See* Abdo, p. 147 concerning how some Progressive Muslim groups have been able to manipulate the mainstream media to secure press attention which is proportionally greater than their own numbers and influence within the greater Muslim community.

[652]Abdo, p. Safi, p. 45; Haddad, *Not Quite American?*, p. 50; Smith, pp. 17, 143-145, 174-175**.**

umma (the idealized universal Islamic community of faith). Increasingly, they consider their Islamic identity more important than that of American citizen.[653] They struggle to create a unified Islamic community despite divisive issues of race, ethnicity, and gender.[654]

American imams, such as Sheikh Hamza Yusuf of the Zaytuna Institute, seek to help them by exploring the traditional Islamic texts and using the principle of *ijtihad* (independent Islamic reasoning) to develop teachings which faithfully address the American realities. [655] Like Turabi and Ghanassi, these American imams embrace the concept of *dar al-ahd* ("house of treaty") and encourage their followers to help save America's soul.[656] Still, their critical social stance and harsh anti-American rhetoric has been off putting to the general public.

By the year 2000, it was clear that Muslim Americans had begun to actively engage in the U.S. political scene. Despite critical rhetoric, the vast majority of American Muslims gratefully acknowledged the freedoms and opportunities available to them in the United States. Yet, their guiding motivation for social engagement often made other Americans uncomfortable. Protecting Muslim rights and promoting Islamic interests appeared to be their primary motivation, as opposed to patriotism.[657]

In defense of Muslims, it was difficult to be uncritically patriotic in the face of the growing social inequality, elitist domestic policies, and foreign policies adverse to

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[653] Abdo, p. 4, 190, 201.
[654] Abdo, p. 46**;** Omid Safi, "Progressive Islam in America," *A Nation of Religions* (Chapel Hill, NC: University of North Carolina Press 2006), pp. 43-59, at pp. 44-45, 54-57.
[655] Abdo, pp. 21-22, 144. *See* Safi, p. 54 who indicates that Progressive Muslims generally hold to inherited traditions, seriously engaging these sources to find a way through problematic Islamic traditions rather than discounting them.
[656] Abdo, p. 33. The concept of ***dar al-ahd*** (house of treaty) was first developed by the "father of Muslim jurisprudence," Abu Abd Allah ash-Shafi in his work, *Risalah* (817 A.D.)
[657] Bagby, "Isolate, Insulate, Assimilate," p. 36.

Muslim interests. Further, a series of current events had underscored American insensitivity toward Islamic interests. This was repeatedly demonstrated by America's uncritical support of Israel despite Palestinian oppression, establishment of American bases in Saudi Arabia and invasion of Iraq, and the rush to judge the Oklahoma City bombing the result of Islamic fanatics. These events, coupled with prejudices voiced in the media, signaled that American Muslims were still negotiating their place within the American mosaic. The events of September 11 were destined to have a lasting impact upon this process.

F. Grave Challenges Presented by September 11 & the Muslim Concept of Jihad

Terrorists not only destroyed numerous lives in felling the Twin Towers and a wing of the Pentagon on September 11, 2001, they seriously challenged the American ideals of citizenship. Both Muslim Americans and their compatriots were forced to confront deeper issues that for too long had gone unaddressed. For Muslim Americans, the issue was whether they would acknowledge the terrorists' Islamic justifications for their actions and engage with American society to resolve the aftermath.[658] For the remaining U.S. citizens, the challenge was whether to embrace American principles of religious freedom and seek understanding or to react with fear and suspicion.

The jihad practiced by the 9/11 Terrorists differs significantly from the religious concept theologically accepted by most Muslims. This is because the terrorists' actions violate the Qur'anic injunction forbidding murder and suicide: "slay not the life that God

[658] Although some of the hijackers were not religiously observant, such as Muhammad Atta who was seen frequenting bars, all nineteen were Muslims and had received instructions on the Quranic verses and prayers to be recited at each step of their terrorist plan. As Omar Safi concludes, "at a minimum, 9/11's masterminds attempted to legitimize their terror by appealing to Islamic symbols and language." Safi, "Progressive Islam in America," *A Nation of Religions*, p. 49.

has made sacred."[659] It must be noted that the Qur'an contains passages justifying defensive *jihad* and the *jihad* against persecution until the region belongs entirely to Allah.[660] The believer is instructed: "Struggle against the unbelievers wherever you find them."[661]Yet, as with Biblical references to violence, the Qur'an counterpoises an overriding message of *salam* (peace).[662]

A relatively obscure term, *jihad* appears in only 0.4% of the Qur'an.[663] Directly translated as "struggle," *jihad* derives from the Arabic root *jhd* associated with "striving", distinguishable from *harb* meaning "war" or *qital* meaning "killing." It denotes a totalizing effort.[664] More numerous references exist in the *hadith* (recorded oral traditions), with individual passages assigned varying degrees of accuracy by Islamic scholars. Jihad has always been accepted as a means to impose "the right" and to forbid "the wrong." Over time, Islamic jurists interpreted the Qur'an and *hadiths* under pressure from various rulers to justify their expansionist endeavors. Despite the *hadith* in which the Prophet defined the best *jihad* as speaking truth to a tyrant, *jihad* was increasingly interpreted to allow for state use as a tool of territorial expansion.[665] The theological concept of *al-jihad al-akbar* (the greater jihad, striving for the spiritual presence of God) became divided from *al-jihad al-askghar* (the lesser jihad, striving to bring God's presence to earth).[666]

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[659] Holy Qur'an, 6:152.
[660] Holy Qur'an 9:5, 8:39.
[661] Holy Qur'an 9:5.
[662] Mark Juergensmeyer, *Terror in the Mind of God: The Global Rise of Religious Violence* (Berkeley: University of California Press 2000), p. 79.
[663] Gabriele Marranci, *Jihad Beyond Islam* (New York: Berg 2006), p., 21.
[664] Marranci, *Jihad Beyond Islam* , p. 19.
[665] L. Carl Brown, *Religion and the State: The Muslim Approach to Politics* (New York: Columbia University Press 2000), pp. 26-30, 44.
[666] Marranci, pp. 22-23.

Understood as a spiritual process, the more important *al-jihad al-akbar* was divided into *jihad al-qalb* (internal struggle of the heart against worldly temptation), followed by *jihad al-kalima* (external struggle of the tongue in preaching Islam), and culminating in *jihad al-bi-al-yad* (social struggle of the hand to socially demonstrate the power of Islam through good deeds). The lesser *jihad al-asghar* had a military connotation and so, was categorized as *jihad bi-al-saif* (external struggle of the sword) limited to use only as a last resort against a direct threat to Islam.[667] These categories came into existence as the product of philosophical and theological attempts to unify the long line of scholarly opinions into a system useful to Muslim communities. Still, none of these juridical categories interpreted Islam as advocating nor legitimating either the murder of innocents or non-defensive killing, which are strictly forbidden under the Qur'an, Sunna, and Hadith. [668]

Today, some Muslims disaffected by their experience with the Western societies, have attempted to interpret *jihad* for themselves. Having attempted to modernize their societies through Arab nationalistic efforts and capitalism, many Muslims have rejected Western methods. Increasingly, they have turned to their faith for answers as evidenced by the growing Islamic Revival. Through the lens of Islamic theology (like Jewish and Christian faith), the sexual deviance and materialistic greed represent *haram* (sin). Facing questions from others and themselves, many Muslims attempt to answer these inquiries by dedicating their life to Islam.[669]

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[667] Marranci, pp. 22-23.
[668] Marranci, pp. 22-23. *See also* Michael Bonner, *Jihad in Islamic History: Doctrines and Practice* (Princeton: Princeton University Press 2006), pp. 169-171.
[669] Haddad, "The Dynamics of Islamic Identity," *Muslims on the Americanization Path* ,Y. Haddad and J. Esposito, eds.(New York: Oxford Press 2000), pp. 38-40,; Marranci, pp. 22-23 114, 106-108, 154-155.

Prior to September 11, most liberal American Muslims had embraced modernism and sought to outwardly assimilate with Western society. They embraced *jihad* as a spiritual struggle to stay true to the tenets of Islam while living a normal American life. Progressive Muslims (often Western born) viewed *jihad* as a challenge to convert the world to the just and egalitarian principles of Islam. The struggle represented both the spiritual striving to remain faithful to the tenets of the Prophet Muhammad and the physical struggle to confront injustice in the active pursuit of nonviolent social change.

For traditionalist Muslims, *jihad* meant combat, both internal and external. The temptations of an American lifestyle were perceived as decadent and immoral, triggering an internal battle to maintain spiritual purity. Further disaffected by the perceived inconsistency between American democratic principles and foreign policy, they sought to impose their Islamic vision upon the external world. The vast majority of traditionalists attempted to express themselves through peaceful means. The rhetoric of violent *jihad* became a means of affirming their Muslim identity. As the Muslim community and media grew to regard American society as threatening the very existence of the Islamic values and culture, traditionalists' *jihadi* rhetoric escalated in tone and tenor. While the vast majority of fundamentalist Muslims expressed themselves through aggressive rhetoric, a few have violently taken matters into their own hands. [670]

Initial reactions to September 11 were mixed. Experiencing the universal shock and horror, many Muslim Americans were unable to believe that their religion of peace could

[670] Safi, "Progressive Islam in America," *A Nation of Religions*, pp. 49, 55-56 and Marranci, pp. 9, 11, 50-51, 81-89, 103, 106-108, 114. Haddad, "The Dynamics of Islamic Identity," pp. 38-40. Bonner, *Jihad in Islamic History* , pp. 169-17174. *See* Smith, p. 174: "… Islam is the only monotheistic religion that has become the object of such insults and false accusations." *See* Bonner, *Jihad in Islamic History* , p.168: "In the Quran, and also in the early narrative texts of sira and maghazik fighting in the wars is a matter of identity and belonging."

be subverted to justify such repugnant violence. Through the internet and e-mails, some concocted conspiracy theories implicating U.S. Central Intelligence and Israel's Mossad in a scheme to discredit Islam and support violent attacks against Muslim lands. Some Muslim Americans felt twice victimized – as Muslims and as Americans.[671]

Within hours of the attacks, major Islamic organizations in the U.S. had issued a joint statement condemning the terrorists and calling for justice. These organizations and many individual Muslims denounced al-Queda as un-Muslim and distinguished their own Islamic beliefs. They recognized the extensive relational damage resulting from these terrorist acts and sought to publicly reaffirm their identity as Muslim Americans.[672] However, only a small number felt comfortable enough to openly acknowledge that Islam (like all religions) encompassed a range of interpretations, one of which had been used to justify the violence through the Islamic concept of jihad.[673]

All Muslim Americans suffered deep shock and feared violent reprisals.[674] Some Americans did brutalize persons whom they believed to be Muslim – sometimes mistakenly, such as the Sikh man murdered for wearing a turban.[675] Ministers of the Christian Right, including Rev. Pat Robertson and Rev. Franklin Graham, incited anti-

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[671] Safi, "Progressive Islam in America," *A Nation of Religions*, p. 50.
[672] Aminah Mohammad-Arif, *Salaam America: South Asian Muslims in New York* (London: Anthem Press 2000), p. 274; Safi, "Progressive Islam in America," *A Nation of Religions*, p. 50. Note that the American Muslim organizations issuing the Sept. 11, 2001 joint statement of condemnation against the al-Queda attacks included Islamic Society of North America (ISNA), Islamic Circle of North America (ICNA), W.D. Mohammad's Muslim American Society (MAS), the American Muslim Political Coordination Council (the umbrella group for the major American Muslim public affairs organizations), and many others. Mohamed Nimer, "Muslims in America after 9-11," 7 J. *Islamic L. & Culture* 1 (Fall 2002/Winter 2003), at p.2.
[673] Safi, "Progressive Islam in America," *A Nation of Religions*, p. 50.
[674] Haddad, *Not quite American?*, p. 41.
[675] The victim, Balbir Singh Sodhi, was Sikh businessman who was shot by a self-proclaimed American patriot in Mesa, Arizona. After September 11, the FBI Hate Crimes Unit recorded a considerable rise in anti-Muslim attackes from 28 in 2000 to 481 in 2001. During the nine months after September 11, the Council on American-Islamic Relations reported more that 1,715 racist incidents, including 303 reports of physical violence. Abdo, *Mainstreet and America*, p. 85.

Muslim sentiment by preaching an exclusionary message that cited the al-Queda attacks as proof that there was no place for non-Christians but hell.[676]

Yet, the general American response was reflected in the motto which soon became ubiquitous, "United We Stand."[677] Many Christians and Jews rallied behind the Muslim American Community. Some volunteered to stand watch over mosques in an effort to prevent vandalism. Others donned scarves in solidarity, ran errands or safely escorted their Muslim neighbors.[678] In addition, a renewed emphasis upon interfaith relations followed. An unprecedented number of interfaith services were held nationwide, with many local leaders of different faiths coming together to pray for both the victims and peace.[679] Religious faith provided American citizens transcendent and tangible resources which brought solace, strength, fortitude, and hope. Spirituality helped to unite the nation and assisted its people in coping with the aftermath of a terrible crisis and to bravely face an uncertain future.

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[676] Scott Alexander, "Inalienable Rights?: Muslims in the U.S. Since September 11th," 7 J. *Islamic L. & Culture* 103 (Spring/Summer 2004), at pp. 123-124; Nimer, "Muslims in America after 9-11," at p. 16. For an interview of Rev. Pat Roberson concerning his critical remarks concerning Islam *see* http://archives.cnn.com/2002/US/02/25/robertson.islam.cnna/ accessed on 11/18/07.

[677] Mohammad-Arif, *Salaam America*, p. 269.

[678] Chrisanne Beckner, "A Separate Peace," *Sacramento News & Review* (Sept. 5, 2002) accessed at http://www.newsreview.com/sacramento/Content?oid=13024 on 9/21/2008; Michael I. Lichter, "Living under Suspicion: Arabs and Muslims in Buffalo after 9/11," Draft Paper Prepared for Presentation at the Annual Meetings of the Society for the study of Social Problems (Philadelphia August 12-14 2005), p. 14 accessed at http://www.acsu.buffalo.edu/~mlichter/Files/Lichter%20SSSP%202005.pdf on 7/21/2008. *See also* Costas Panagopoulos, The Polls-Trends: Arab and Muslim Americans and Islam in the Aftermath of 9/11," *Public Opinion Quarterly*, Vol. 79, Iss. 4 (Chicago: Winter 2006), pp. 608626, at p. 608-609; Mohamed Nimer, "Muslims in America after 9-11," 7 *J. Islamic L. & Culture* 1 (Winter 2003), pp. 10-15.

[679] Haddad, *Not quite American?*, p. 42; Nimer, "Muslims in America after 9-11," at pp. 12-13. *See* website for Scarves for Solidarity which was started by Jennifer Schock, a 31 year old website designer from Fairfax, VA: www.interfaithpeace.org.

G. American Fear, Tolerance, and The Patriot Act

Initially, the Bush Administration declared a "crusade" against terrorism before quickly changing course to distinguish the religion of Islam from the face of terrorism. In a September 17th press conference before the Islamic Center in Washington, D.C., President Bush attempted to repair the initial damage by defining Islam as "peace." He then made reference to the important contributions made by Muslim American citizens, demanding that they be treated with respect. [680] Muslim leaders subsequently praised the President's leadership in quieting anti-Muslim violence by distinguishing terrorism from Islam and terrorists from law-abiding Muslim Americans.[681]

Yet, simultaneously, the federal bureaucracy was moving swiftly to curtail Arab and Muslim presence within the United States. On September 18th, President Bush declared a

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[680] Abdo, p. 85. On 16 September 2001, President Bush initially warned Americans, "this crusade, this war on terrorism, is going to take awhile." Quoted by the *Christian Science Monitor* at :http://www.csmonitor.com/2001/0919/p12s2-woeu.html accessed on 11/14/07.
When both Muslims and Europeans protested the use of the historically laden term "crusade", the next day he changed his choice of words and moved toward a more conciliatory stance. During this 17 September 2001 press conference, President Bush unequivocally stated:

> "The face of terror is not the true faith of Islam. That's not what Islam is all about. Islam is peace. These terrorists don't represent peace. They represent evil and war. When we think of Islam we think of a faith that brings comfort to a billion people around the world. Billions of people find comfort and solace and peace. And that's made brothers and sisters out of every race -- out of every race. America counts millions of Muslims amongst our citizens, and Muslims make an incredibly valuable contribution to our country. Muslims are doctors, lawyers, law professors, members of the military, entrepreneurs, shopkeepers, moms and dads. And they need to be treated with respect. In our anger and emotion, our fellow Americans must treat each other with respect

http://www.globalsecurity.org/military/library/news/2001/09/mil-010917-usia10.htm accessed on 11/14/07. A portion of this press release is quoted by Safi, "Progressive Islam in America," *A Nation of Religions*, p. 43. Safi cites "Bush: U.S. Muslims Should Feel Safe," CNN (10/11/2001) http://www.cnn.com/w001/US/09/17/gen.bush.muslim. trans/

[681] Example**s** include: The 10/8/2001 statement of American Muslim Council, "The AMC appreciates the President's leadership in affirming that this is a war against terrorism and not against the Afghan people, Muslims or Islam." Cited by Nimer, "Muslims in America after 9-11," at p. 6 and Arab American Institute Director James Zogby, who stated, "the president saved lives by speaking out against anti-Arab and anti-Muslim violence. … There is no question the collective effort of the national leadership stopped hate crimes in their tracks, changed the national discourse and brought out our better angels. I will never forget what [Bush] did." ___, "Arab-American Chief," *The National Review* (March 25, 2002) cited in Salah D. Hassan, "Arabs, Race and the Post-September 11 National Security State," *Middle East Report*, No. 224 (Autumn 2002), pp. 16-21, at p. 16.

state of national emergency and called the U.S. armed forces reserve troops to active duty.[682] Two days later, he delivered a speech before Congress declaring the attacks "an act of war against our country."[683] At the same time, he announced the creation of the Office of Homeland Security and the Homeland Security Council with purposes of developing and coordinating a comprehensive national security strategy against terrorist attack.[684] By characterizing the terrorist attack as an act of war, the President attempted to widen his powers and to secure the greater compliance which Congress typically grants during periods of open conflict. His strategy proved successful when Attorney General John Ashcroft presented Congress with he Administration's list of proposed legal changes to combat terrorism. In the wake of September 11, these measures quickly passed with little debate.[685]

H. Uneven Enforcement of the Patriot Act

On 26 October 2001, President George W. Bush signed the USA PATRIOT ACT into law.[686] This omnibus terrorism act created a new legal culture within the U.S. which has permitted the violation of the Constitutional rights of U.S. citizens and residents alike. Arabs and Muslims would be repeatedly targeted under its provisions, being subject to

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[682] Proclamation 7463, 66 Fed. Reg. 48, 199 (Sept. 18, 2001) and Exec. Order No. 13,233, 66 Fed. Reg. 48, 201 (Sept. 18, 2001) both cited by Barry A. Feinstein, "Terrorist Attacks on World Trade Center and Pentagon," 96 *Am. J. of Int'l L.* 237 (Jan. 2002), at p; 242

[683] Address Before a Joint Session of the Congress on the United States Response to the Terorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1347 (Sept. 20, 200) hereinafter Address Before a Joint Session] cited by Barry A. Feinstein, "Terrorist Attacks on World Trade Center and Pentagon," 96 *Am. J. of Int'l L.* 237 (Jan. 2002), at p. 242.

[684] Exec. Order No. 13, 228, 66 Fed. Reg. 51, 182 (Oct. 10, 2001).

[685] Adam Clymeer, "Antiterroism Bill Passes U.S. Gets Expanded Powers," *New York Times* (October 26, 2001), at p. A1; at p.01J; Jessee Walker, "No More Surprises: Government Doesn't Need More Power," *Milwaukee Journal Sentinel* (May 26, 20002). *See* Nancy Change, "How Democracy Dies: The War on Our Civil Liberties," *Lost Liberties*, C. Brown, ed. (New York: The New Press 2003), p. 33.

[686] USA PATRIOT ACT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism)., Pub. Law 107-56, 115 U.S. STAT. 272 (2001).

monitoring, detention, registration, and deportation in far greater numbers than the rest of the population.[687] On October 31, 2001, the Attorney General institutionalized his detention strategy by creating the Foreign Terrorism Tracking Force (FTTF). Using the INS and U.S. immigration law, the FBI was instructed to use technical immigration violations as the pretext to seize "suspicious" Muslim/Arab men without "probable cause" or any evidence of "overt acts." Despite contrary public statements from both the President and the Attorney General, the Administration's anti-terrorism strategy was clearly targeting persons of Arab and Muslim origin.[688] Human Rights Watch has issued reports finding that many of these men were held without charge, prevented from contacting lawyers or their families, and denied bond. Later, the Justice Department Inspector General found that many of these detainees were physically maltreated and verbal abused in custody.[689]

On 25 January of 2002, Attorney General Ashcroft began the Absconder Apprehension Initiative. Under this policy, the names of 6,000 Arabs and Muslims issued deportation orders were entered into the National Crime Information Center (NCIC), a database previously reserved exclusively for criminals. All men from twenty-five countries, predominantly Arab and Muslim, were ordered to report for fingerprinting and photographing at immigration service offices. Those without proper papers were immediately handcuffed and led away. Public protests were beginning to mount, but the detentions continued. [690]

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[687] Norgren and Nada, pp. 246-250; Abdo, p. 84; Haddad, *Not Quite American?*, pp. 42-43.
[688] Norgren and Nanda, *American Cultural Pluralism and Law*, pp. 248-249.
[689] Abdo, p. 84; S*ee also* Norgren and Nanda, pp. 248, 250.
[690] Kate Martin, "Secret Arrests and Preventive Detention," *Lost Liberties: Ashcroft and the Assault on Personal Freedom*, C. Brown, ed. (New York: The New Press 2003), pp. 75-90, pp. 84-85.

In October 2001 President Bush sent U.S. troops into Afghanistan, a Muslim country. His stated purpose was to unseat the Taliban government and capture the al-Queda leader which it was harboring, Osama bin Laden.[691] American Muslim leaders remained outwardly supportive of U.S. government efforts. National Islamic organizations urged the American Muslim community to share information about suspected terrorists and work with law enforcement. The groups even endorsed the military campaign into Afghanistan. A November 2001 poll commissioned by Muslims in the American Public Square (MAPS) indicated that the vast majority of American Muslims agreed with their leaders, with 60% approving President Bush's handling of the terrorist attacks and 66% confirming that the war effort targeted terrorism, not Islam. Over half of these Muslims registered support for the U.S. military action.[692]

However, Muslim American support for Bush Administration policies would not last long. Despite their offers of assistance, federal agencies refused the help or consultation of Muslim citizens. The White House pushed relentlessly for war against Iraq, eventually invading the country in March 2003 upon intelligence accounts concerning weapons of mass destruction (WMD) which later proved both flawed and exaggerated.[693] While American Muslims became increasingly uncomfortable with the Administration's unfeeling preference for war over diplomatic efforts, domestic policy undercut their political allegiance to President Bush.

At the same time they were detaining and deporting resident aliens, the Bush Administration was taking action against Muslim American citizens. Claiming the right

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[691] Barry A. Feinstein, "Terrorist Attacks on World Trade Center and Pentagon," 96 American Journal of International Law 237 (January 2002), at p. 246.
[692] Nimer, "Muslims in America after 9-11," at pp. 5-7. Note that the poll was conducted by Zogby International from November 8-19, 2001 and queried 1,781 American Muslims.
[693] Brasch, *America's Unpatriotic Acts*, pp. 24-25.

to designate as "enemy combatants" U.S. citizens as well as foreign nationals, the Justice Department attempted to hold two U.S. citizens in indefinite military detention without access to a lawyer or federal court hearing despite properly filed habeas corpus petitions. The first such person was Yasser Hamdi, who the government announced in April 2002, was born in Louisiana, raised in Saudi Arabia, and captured fighting for the Taliban in Afghanistan. The government held him incommunicado for almost two years before his father brought a habeas corpus petition on his behalf claiming violations of his son's rights under the Fifth and Fourteenth Amendment. The U.S. Supreme Court decided 8-1 that Hamdi, as a U.S. citizen, had the constitutional right to argue the illegality of his detention before an American Court. The Court insisted that:

> "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[694]

The Supreme Court vacated the Fourth Circuit Judgment and remanded the case to the District Court for an equitable hearing. Before this could be accomplished, the U.S. government negotiated with Hamdi's lawyers, allowing his return to Saudi Arabia under conditions including his renunciation of his American citizenship, agreement not to seek permission to travel to the U.S. for the next ten years, and to release the U.S. from any legal liability for his detention, and to surrender his right to challenge any terms of the settlement agreement in court.[695]

The second U.S. citizen was Jose Padilla, who Attorney John Ashcroft announced in June of 2002 was initially arrested as a material witness in O'Hare Airport, Chicago.

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[694] *Hamdi v. Rumsfeld*, 542 U.S. 507, at 603**;** 124 S. Ct. 2633, at 2650; 159 L. Ed. 2d 578 (2004).
[695] Philip Shenon, "U.S. Signals End to Legal Fight Over an 'Enemy Combatant'," New York Times (August 12, 2004), p. A10; Joel Brinkley,"From Afghanistan to Saudi Arabia, via Guantanamo," New York Times (October 16, 2004), p. A4 both cited by Norgren and Nada, pp. 258, 264, ftn. 25.

Padilla was an American convert to Islam who, according to the government, was scouting information for a radioactive "dirty" bomb attack in the U.S. Although he was not charged with a crime, the government changed his status to that of an "enemy combatant" and moved him to the naval brig in Charleston, South Carolina. There Padilla was held incommunicado, subjected to interrogation, and denied access to counsel. Padilla's attorney filed a habeas corpus petition not only seeking his release, but also to be allowed to see and consult with her client.[696] The Supreme Court dismissed Padilla's case in a 5-4 decision based upon narrow jurisdictional grounds, ruling that his action was brought in the "wrong forum" and must be reinstituted in South Carolina.[697] Thereafter, Padilla's lawyers refiled in South Carolina where they initially won a trial court ruling that the president had exceeded his authority by holding Padilla for three years. However, the trial court's decision was overturned by the unanimous ruling of the federal appeals court that the president possessed the authority to hold Padilla as an enemy combatant. Padilla's request for certiorari review was subsequently denied by the U.S. Supreme Court because of his release from detention, only to be turned over to the Attorney General and charged with federal crimes. Today, he remains in federal prison, under supervision of the U.S. Circuit Court for the Southern District of Florida, awaiting trial.[698]

Implicit in the Administration's terrorism policies has been the underlying assumption that non-U.S. born Muslim males of Asian, Middle Eastern, or North African origin pose

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[696] Norgren and Nada, pp. 252, 263, ftn. 20.
[697] *Rumsfeld v. Padilla* , 542 U.S. 426,124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004). Ronald Dworkin, "What the Court Really Said," *New York Review of Books* (August 12, 2004), p. 27 cited in Norgren and Nada, pp. 252, 263, ftn. 20.
[698] Padilla v. Hanft, 389 F. Supp. 2d 678 (D. S.C. 2005), reversed by 432 F. 3d 582 (4th Cir. 2005), cert. denied 547 U.S. 1062, 126 S. Ct. 1649, 164 L. Ed. 2d 40 (2006)**;** Norgren and Nada, p. 252.

a security risk to the United States, even if they are U.S. citizens.[699] Federal investigative measures have subjected mosques, Islamic centers, and Muslim Americans to undercover surveillance, review of personal records, monitoring of communications, and even domestic raids in covert attempts to stem future terrorist plots.[700] Combined with other enforcement measures under the USA PATRIOT Act and Homeland Security Act[701], these federal governmental activities created fear and anxiety in the Muslim American community. These methods also caused distrust and alienation from the American public officials and law enforcement.[702] In addition, many other American citizens and civil rights organizations have begun to question whether the executive branch has overstepped its legitimate powers as it rushes to secure the country and its borders.[703]

Also contributing to a negative climate for Muslism citizens, the U.S. media repeatedly focuses upon radical Islam and its alleged clash with Western culture, failing to cover the moderate voices of the Muslim American majority, their leadership, or respected Islamic scholars. Further, mainstream American news tends to dehumanize the Muslim victims of war, to portray Muslims as mobs of American-haters opposed to U.S. values, and to ignore Islamic concerns. The consequences of biased U.S. media coverage have proven two-fold. First, public discrimination and hate crimes have risen.[704] A 2004

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[699] *See* Cainkar, "The Impact of September 11," p. 4.
[700] Nimer, "Muslims in America after 9-11," at pp. 28-31; Heymann, "Muslim in America after 9/11," p. 15; Cainkar, "The Impact of September 11," pp. 1- 2, 4; Haddad, *Not Quite American?*, pp. 42-44.
[701] USA PATRIOT ACT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism)., Pub. Law 107-56, 115 U.S. STAT. 272 (2001). Homeland Security Act of 2002, Pub. L. No. 107-296 451, 116 Stat. 2005 (codified primarily at 6 U.S.C. 101 et seq.). (2002).
[702] *See* Heymann, "Muslim in America after 9/11,"
[703] Cainkar, "The Impact of September 11," p. 2; Martin, "Secret Arrests and Preventive Detention," *Lost Liberties*, p. 78; Brasch, *America's Unpatriotic Acts*, pp. xiv-xv, 78-79.
[704] Norgren and Nanda, *American Cultural Pluralism and Law*, p. 248. Note that the FBI Annual Hate Crimes Statistics for 2001 revealed a 1,600% increase in anti-Muslim hate crimes and an almost 500% increase in ethnic-based hate crimes against Arabs. The FBI responded by increasing its response to anti-Muslim hate crimes by investigating 128 possible hate crimes in 2005 in comparison to 28 crimes in 2000. From September 11, 2001 through December 11, 2006, the Department of Justice, FBI, and U.S. Attorney

survey conducted by Georgetown University and Zogby International found that since 9/11, forty percent American Muslims polled personally experienced anti-Muslim discrimination. Fifty-seven percent knew friends or family who suffered discrimination at work, school, or within their neighborhood.[705] Second, Muslim Americans increasingly have relied upon sources other than the U.S. media for their information. Most popular of these alternative origins are the internet and e-mail, followed by foreign news stations like BBC and Arabic satellite channels such as al-Jazeer and ART. These information sources are generally perceived by Muslim Americans as more balanced, or at least revealing other perspectives not depicted by the U.S. media.[706]

I. Discrimination Inspires Muslim American Participation

Faced with rising prejudice and mounting hate crimes, American Muslims have become aware that their previous self-imposed isolation and absence from public debate

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offices have investigated 742 hate crime incidents, bringing federal charges in 27 cases against 35 defendants, obtaining 32 convictions. Heymann, "Muslim in America after 9/11," p. 17. See Alexandra Marks, "U.S. Works to Bridge its Muslim Trust Gap" at http://www.csmonitor.com/;2006/1127/p01s03-ussc.html accessed on 11/27/2006 and Dept. of Justice, Civil Rights Division, Post 9/11 Activity Update, Enforcement and Outreach Following the September 11 Terrorist Attacks accessed at http://www.usdoj.gov/crt/legalinfo/dicrimupdate.htm accessed on 11/27/2006. Arabs and South Asian Muslims reported 645 biased incidents and hate crimes to the Council on American-Islamic Relations (CAIR) in the first seven days following September. After six months, this number had risen to 1717 , subsequently declining to 325 in the following six-month period. CAIR reported that the attacks reported after 9/11 were more violent than in previous years. While hate crimes decreased in 2002, work place and governmental discrimination was on the rise. Cainker, "The Impact of September 11," pp. 8-9.

[705]Heymann, "Muslim in America after 9/11," pp. 4, ftn. 1 *citing* "Muslims in the American Public Square: Shifting Political Winds and Fallout from 9/11, Afghanistan and Iraq 35-36 (Project MAPS, Center for Muslim-Christian Understanding, Georgetown University and Zogby International, eds. Oct. 2004), available at http://www.projectmaps.com/AMP2004report.pdf *and* Georgetown University, "Georgetown Announces Release of 2004 Muslim Poll (Oct. 19, 2004) available at http://explore.georgetown.edu/news/?ID=1310 accessed on 11/20/07.

[706] Cainkar, "The Impact of September 11," p. 14; Norgren and Nada, *American Cultural Pluralism and Law*, p. 248. *See also* Haddad, "The Dynamics of Islamic Identity," *Muslims on the Americanization Path* ,Y. Haddad and J. Esposito, eds.(New York: Oxford Press 2000), pp. 24-25.

left their community vulnerable to prejudice and scape-goating.[707] Since September 11, they have become more socially and politically active in combating public misperceptions about Islam and discrimination against Muslims. African-American Muslims have led the way in this regard. Experienced in racism and veterans of the civil rights movement, members of the predominantly African-American ASM (American Society of Muslims) have urged their co-religionists to become active in the public square and voice their political opposition to discriminatory practices.[708] Leadership has also come from second-generation Muslims who demand Constitutional liberties and equal treatment. They call American Muslims to leave ethnicity and division behind, uniting together as a single *umma* with one voice in the public square.[709]

Immediate responses included joint Islamic organizational statements condemning the terrorist attacks, a full page condemnation in the *Washington Post*, as well as refutations of al-Qaeda's methods voiced to the Middle Eastern channel al-Jazeerah, the Arabic language newspaper *al-Hayat*, and the American television show *60 Minutes*.[710] Both Muslim and Arab organizations have distributed information via websites and joined coalitions to combat threats to their communities' civil liberties.[711] Local mosques and Islamic Centers have developed outreach programs for non-Muslims, engaged in interfaith dialogues, and increased their level of civic involvement. They have taken

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[707] Mohammad Nimer, "Muslims in American Public Life," *Muslims in the West: From Sojourners to Citizens*, Y. Haddad, ed. (New York: Oxford University Press 2002), p. 171.
[708] Bagby, "Isolate, Insulate, Assimilate," pp. 27, 32-34, Tables 1.9 & 1.10. Note that the ASM follows the leadership of Imam W. Deen Mohammed, who took over the Nation of Islam upon the death of his father Elijah Muhammad in 1975. He champions patriotism, the American Constitution, and interfaith dialogue.
[709] Haddad, Not Quite American?, p. 50; Eck, *A New Religious America*, pp. 267-268.
[710] Mohammad Nimer, "Muslims in America after 9/11," 7 J. Islamic L. & Culture 1 (Fall 2002/Winter 2003), at p. 3.
[711] Cainkar, "The Impact of September 11," 13 GSC Quarterly, p. 17; Nimer, "Muslims in America after 9/11," p. 32-33; Coke, "Racial Profiling Post 9/11,' *Lost Liberties*, p. 98; Haddad, *Not Quite American?*, p. 45.

concrete steps to open the doors of their worship spaces and offered public education on their faith. As one Muslim leader explained,

> "We are in a desperate situation. We are isolated from others and need to build bridges."[712]

Individual Muslims have increasingly accepted invitations to speak publicly about their faith, become involved in community service, and participate in interfaith activities.[713] Their efforts have been rewarded not only with greater understanding and acceptance, but also by numerous conversions to Islam.[714]

The events of September 11 have caused deep introspection among many Muslims of both the tenets of their religion and their relationship with the United States. Increasingly they have come to embrace their unique identity as both Muslims and American citizens. Reawakened to their Islamic faith, men have returned to daily prayers and women have donned the *hijab*,[715] practices previously forsaken by their parents.[716] As U.S. citizens, they have demanded the right to freely exercise their religious beliefs and to openly voice their political positions. One woman succinctly stated,

> "I feel American, I bleed American, my country denies me that identity because I am Muslim."[717]

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[712] Cainkar, "The Impact of September 11," 13 GSC Quarterly, p. 15. *See* Haddad, *Not Quite American?*, p. 45, 49-51.
[713] Mohammad Nimer, "Muslims in America after 9/11," p. 8-10, 13. Cainkary, "No Longer Invisible," 224 Middle East Report 22 (Fall 2002), pp. 28-29; Cainkar, "The Impact of September 11," 13 GSC Quarterly, pp. 14-15.
[714] Abdo, p. 167.
[715] *Hijab* is the Arabic term meaning "veil" or the practice of modest dress. Typically, it refers to the headscarf worn by Muslim women to cover their ears and hair. *See* "Hijab," *Dictionary* accessed at http://encarta.msn.com/dictionary_701706549/hijab.html on 7/20/2008.
[716] Abdo, pp. 5, 29-30, 157.
[717] Cainkar, "The Impact of September 11," 13 GSC Quarterly, pp. 18-19: Abdo, p. 83

Politically, America's Islamic citizens have come into their own. In the November 2004 election, Muslim Americans turned out to vote in the largest numbers recorded in U.S. history. They overwhelmingly supported John Kerry by a margin of 93%, representing the most cohesive voting bloc in the entire presidential campaign. Their vote has been viewed by analysts as one for democracy, civil liberties, and human rights as well as against war and foreign occupation.[718]

Recognizing the law as another mechanism to contest administrative policies and implement political change, Muslim communities are increasingly engaging in legal activism.[719] Muslim women in particular have chosen to officially dispute dominant norms and bureaucratic decisions that infringe upon their religious rights.[720] One national Muslim women's organization, KARMA (the Muslim Women Lawyer's Committee for Human Rights) is devoted to educating women and helping them achieve their legal rights.[721] In 2003, their Executive Director Azizah al-Hibri asserted,

> "We need narrowly tailored laws to achieve our security without losing our cherished liberties. We also need to have these laws executed in a more humane fashion, without disregard of due process or other constitutional rights."[722]

To this end, many Muslim American men and women continue to challenge the deprivation of their due process and constitutional rights in federal and state courts.

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[718] The Muslim American turnout for the 2004 election was not only the largest in U.S. history, but represented a 20% increase in voter registration over the 2000 presidential election. ___, "Democracy in Action: American Muslim Vote Unifies Disparate Groups and Revitalizes the Democratic Process," The Daily Californian (January 24, 2005) accessed at http://www.dailycal.org/printable.php?id=17364 on 11/21/07.

[719] Smith, *Islam in America*, p. 179; Kathleen Moore, "Representation of Islam in the Language of the Law: Some Recent U.S. Cases," *Muslims in the West : From Sojourners to Citizens*, Y. Haddad, ed. (Oxford ; New York : Oxford University Press 2002), pp. 187-204, at pp. 199-200.

[720] Nadine Strossen, "Freedom and Fear Post 9-11: Are We Again Fearing Witches and Burning Women," 31 Nova L. Rev. 279 (Winter 2007), at pp. 301-303, 304-311.

[721] Smith, *Islam in America*, p. 171.

[722] al-Hibri, "Opening Remarks," 19 *J. Law & Religion* 59, at p. 59.

J. Muslim Americans Encounter Participation-Membership Tensions at the Border

Dr. Sawaana Tabbaa is one of five Muslim American citizens who has filed suit after being harassed and detained by the U.S. Border Guard upon their return from an Islamic conference in Canada. The travelers experienced first hand the tensions arising between their desire to exercise their religious membership by attending an Islamic conference and the hostile border search that resulted from government misperceptions regarding their participation. Believing that this encounter constituted a violation of their constitutional rights, the group resolved to seek redress against the government in federal court.

All the legal petitioners were returning to the United States after attending the third Reviving the Islamic Spirit Conference held from 24-26 December 2004 at The Sky Dome in Toronto, Canada. Like the two preceding conferences, it had been organized by a cross section of Muslim youth in the Greater Toronto Area. Students and youth created it as a teaching tool to combat the terrorist message of the 9/11 attacks.[723] Their express purpose was to build bridges of friendship between the Muslim and non-Muslim communities. Meeting under the theme "Legacy of the Prophet," the conference brought together a variety of Muslim speakers, scholars, and entertainers focused on messages of facing hatred with love, speaking truth in all matters, and bringing persons to Allah through excellence of character. Young and old were encouraged to attend and "engage in dialogue around the issues of Canadian Muslim identity and the meaning of active

[723] Timothy Lowden and Chris Pelletier with Jacob Drum, "American Like You," *Generation* (Buffalo, NY: Sub-board I, Inc.2005), p. 2 accessed at http://www.subboard.com/generation/articles/110963178942550.asp accessed on 10/27/07.

citizenship."[724] The event was well advertised through Islamic websites and e-mail networks. Registration was taken online.[725]

Many American and Canadian Muslims attended the Reviving the Islamic Spirit Conference of December, 2004. Approximately 13,000 people were present. [726] Families sat together, listening to religious messages encouraging commitment to the Prophet Mohammad's message of peace, love, and justice. It also provided an excellent forum to raise and address concerns felt by Muslims across North America. They were welcomed on behalf of the Canadian government by the Premier of Ottawa, the Mayor of Toronto, and a Commissioner of the Royal Canadian Mounted Police.[727] An international panel of speakers presented messages of tolerance and unity.[728] Among the meeting's featured speakers was Hamza Yusuf, the prominent Islamic scholar who had visited and prayed with President Bush upon a White House invitation received shortly after the 9/11 attacks.[729] Together, the crowd was invited to renew its religious commitment to build a peaceful and just society across North America.

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[724] Muneeb Nasir, "Toronto Hosts Reviving Islamic Spirit Convention," IslamOnline.net (12/23/04) accessed at http://www.islamonline.net/English/News/2004-12/23/article06.shtml on 5/29/06

[725]Registration for the RIS 2004 Conference, at the cost $40 per adult, $25 per child or $190 all inclusive, was taken by MontrealMuslims.ca at http://www.montrealmuslims.ca/rose/4/413?PHPSESSID=82568620ac85ab59b66d76281ca accessed on 5/29/06. Detail of the Conference were provided by IslamOnline.net and at the conference website: http://www.revivingtheislamicspirit.com/convention/about-us.asp

[726] Brief of Plaintiffs-Appellants Sawsan Tabbaa, et al., (2d Cir. U.S. App. Ct. Case No. 06-01190CV (filed 5/08/06), partially redacted, p 2; *See also* AP, "Profiling Case in Second Circuit," (April 21, 2007) accessed at http://lawprofessors.typepad.com/immigration/2007/week16/index.html on 5/15/02.

[727] __, "Homeland Security Violates Civil Rights of Muslim American Citizens," (April 20, 2005) accessed at http://www.allamericanpatiorts.com/node/9610 on 10/25/2007.

[728]Andrea Elliott, "Five Muslims to sue U.S. Over Border Detentions," *New York Times* (April 20, 2005) access at http;//www.nytimes.com/2005/04/20/nyregion/20detain.html?_r=1&oref=slogin on 11/22/2007. *See also* Muneeb Nasir, "Toronto Hosts Reviving Islamic Spirit Convention," *IslamOnline.net* (12/23/04) accessed at http://www.islamonline.net/English/News/2004-12/23/article06.shtml on 5/29/06

[729] Michelle Garcia, "Muslims Detained at Border Sue U.S. Homeland Security," *Washington Post* (April 21, 2005) at p. A-8 accessed at http://www.washingtonpost.com/wp-dyn/articles/A6225-2005Apr20.html accessed on 10/25/07.

Present at the Toronto Conference, Dr. Sawsan Tabbaa had brought her four children ages 3 to 18 to hear the message of peace and friendship.[730] Although her husband was away on business, she believed the conference message so important that she undertook the journey and supervision of the children alone. She also considered the Reviving the Islamic Spirit Conference to be her personal *haj*, fulfilling her Islamic duty.[731] When the Conference ended after two long days, the American orthodontist loaded her four children into the car for the return trip to their home outside Buffalo, New York[732]

A naturalized American citizen born in Syria, Dr. Sawsan Tabbaa is a successful orthodontist whose teaching and research were centered at her alma mater, the State University of New York at Buffalo (SUNY-UB). Both she and her husband, Dr. Othman Shibly, had immigrated to the United States to attend SUNY-UB Dental School when their oldest son, Hassan, was only four years old. As dental students, they had struggled to earn their doctorates while raising their family in a small apartment on $500 per month.[733] Upon graduation, the couple chose to remain in Buffalo and raise their children as American citizens. They took their oath as U.S. citizens seriously, sincerely believing in the founding ideals of America and wanting to contribute for the good of their adopted country.[734] The couple was particularly proud of their eldest son, Hassan Shibly, who was

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[730] Later, Tabbaa told the SUNY-UB student press that the Reviving the Islamic Spirit Conference teaches people "how to work with each other as a human nation, regardless of religion." Timothy Lowden and Chris Pelletier with Jacob Drum, "American Like You," *Generation* (Buffalo, NY: Sub-board I, Inc.2005), p. 2 accessed at http://www.subboard.com/generation/articles/110963178942550.asp accessed on 10/27/07.
[731] Brief of Plaintiffs-Appellants Sawsan Tabbaa, et al., (2d Cir. U.S. App. Ct. Case No. 06-01190CV (filed 5/08/06), partially redacted, p. 7.
[732] Ahearn, "A Stranger in His Homeland," p. 1. Christopher Ahearn, "A Stranger in His Homeland," *Generation* (Buffalo, NY: Sub-board I, Inc.2005) , p. 1 *accessed at* http://www.subboard.com/generation/articles/113866225079927.asp on 10/25/07.
[732] Ahearn, "A Stranger in His Homeland," *Generation*, p. 1.
[733] Ahearn, "A Stranger in His Homeland," *Generation*, p. 1.

[734] ___, "Alumnotes," *Dental Report* (University of New York at Buffalo, School of Denistry: March 2002), p. accessed at http://www.sdm.buffalo.edu/alumni/report/Mar_02_DR.pdf on 10/25/07 and ___,

a political science major at the SUNY-UB.[735] As faithful Muslims and engaged Americans, Dr. Shibly and Dr. Tabbaa work tirelessly for East-West understanding while following the dictates of their faith.[736] Dr. Tabbaa, for example, continued to wear her *hijab.*[737]

Upon their late-night return from the Islamic Conference, Dr. Tabbaa and her family were stopped at 2 a.m. by the U.S. Customs and Border Protection agents while crossing from Canada back into the U.S. at the Queenston Lewiston Peace Bridge. As they handed their passports to the customs agent, they were asked why they had been to Canada. When they responded that they had attended the Reviving the Islamic Spirit Conference in Toronto, they were curtly informed that they had been selected for a random inspection and told to pull over. Directed to park their minivan and enter a nearby building, the family was told to exit their car and were led into a small, frigid room. Surrounding them were Muslim friends and acquaintances from the Toronto religious conference. The cramped room was filled with couples clutching babies, a pregnant woman, children and old folks. Many were seated on the cold, unwashed floor because of a lack of adequate seating.[738]

"2007 Recipients of the AAP Award for Outstanding Teaching and Mentoring in Periodontics," *American Academy of Periodontology* accessed at http://www.perio.org/education/news/teaching-awards07.htm on 11/22/07.

[735] Ahearn, "A Stranger in His Homeland," *Generation*, p. 1.

[736]Sawsan Tabbaa, "Women and Islam-Panel," *Gender Week Programs* (SUNY-UB September 27, 2000) accessed at http://wings.buffalo.edu/AandL/ahi/irewg/generweek2002/genderweek02/genderweek02_descri_events ... on 10/25/07. Nicole Schuman, "Promoting East-West Relations," UB Reporter, VO. 23, No. 4 (September 23, 2004), accessed at http://www.buffalo.edu/reporter/vol36/vol36n4/articles/Shibly.html. on 11/22/2007.

[737] Michelle Garcia, "Muslims Detained at Border Sue U.S. Homeland Security," Washington Post (April 21, 2005) at p. A-8 accessed at http://www.washingtonpost.com/wp-dyn/articles/A6225-2005Apr20.html accessed on 10/25/07. Nicole Schuman, "Promoting East-West Relations," UB Reporter, VO. 23, No. 4 (September 23, 2004), accessed at http://www.buffalo.edu/reporter/vol36/vol36n4/articles/Shibly.html. on 11/22/2007.

[738] Ahearn, "A Stranger in His Homeland," *Generation*, p. 1.

While the family tensely waited with the others in the waiting room, they witnessed border agents come in and take individuals from the room for questioning, fingerprinting, and photographing.[739] Dr. Tabbaa demanded an explanation from the guards, but received none. Walking around the room whispering quiet questions, her suspicions were confirmed – all present were Muslim American citizens and all had attended the Toronto conference. Despite the border guards' refusal to disclose the reason for their search, it instantly became apparent that they were victims of "religious profiling."[740] As her son Hassan later reflected,

> "It was like a reunion in there. You can have some dignity and not lie to us. It's not random when Muslims are two percent of the American population and everyone here is Muslim."[741]

In exasperation, Hassan reached for his cell phone and dialed The Buffalo News. It was immediately seized from him. Then, the authorities confiscated all cell phones, credit cards, and other belongings. Realizing their vulnerability and isolation, feelings of fear began to replace the family's earlier indignation.[742]

Agents asked each detainee questions concerning the nature of the conference, the reason for their attendance, their activities there, and the identities of persons with whom they had met or conversed.[743] They refused to allow anyone to leave without submitting

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[739] Ahearn, "A Stranger in His Homeland," *Generation*, p. 4.
[740] Ahearn, "A Stranger in His Homeland," *Generation*, p. 1. *See also,* Aaron Mendelsohn, "Stranded at the Border," *The Spectrum* , Vol. 57, Is. 35 (February 9, 2005) accessed at http://spectrum.buffalo.edu/article.php?id=19132 on 10/25/07.
[741] Aaron Mendelsohn, "Stranded at the Border," *The Spectrum* , Vol. 57, Is. 35 (February 9, 2005) accessed at http://spectrum.buffalo.edu/article.php?id=19132 on 10/25/07.
[742] Ahearn, "A Stranger in His Homeland," *Generation*, p. 1.
[743] Brief of Plaintiffs-Appellants Sawsan Tabbaa, et al., (2d Cir. U.S. App. Ct. Case No. 06-01190CV (filed 5/08/06), partially redacted, p. 15; Andrea Elliott, "Five Muslims to sue U.S. Over Border Detentions," *New York Times* , p. 2; Lowden, Pelletier, Drum, "American Like You," *Generation*, p. 2.

their fingerprints.[744] When they took her into a separate room for questioning, Dr. Tabbaa vociferously refused to submit to fingerprinting. Agents threatened to put her in a holding cell unless she followed their orders. For his part, Hassan Shibly completed and signed a form concerning whom he had contacted and spoken to during the conference. As the hours dragged on, the Muslim mandated prayer time approached. At the designated time, observant Muslims threw down their coats upon the dirty floor and facing Mecca, worshipped Allah in the middle of the room.[745]

When the interrogators came for Dr. Tabbaa, they insisted upon escorting her into a separate room. Over the tears of mother and child, the border guards physically separated her from her youngest child and led the mother away. Once they were inside the room with several armed guards, she was forcibly fingerprinted.[746] Dr. Tabbaa cried out, "Is this the land of the free?" and began to sob.[747] The border guards released Dr. Sawsan Tabbaa and her family at 6 a.m., allowing them to reenter the United States.[748]

After returning home, the family learned that the U.S. Customs and Border Guard had harassed and held other Muslim Americans for up to six hours. One pregnant mother had been forced to lift her blouse to reveal that she was truly with child and not hiding contraband.[749] Another woman had a female border guard request that she remove her

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[744] Lowden, Pelletier, Drum, "American Like You," *Generation*, p. 2.
[745] Lowden, Pelletier, Drum, "American Like You," *Generation*, p. 2; Ahearn, "A Stranger in His Homeland," *Generation*, p. 5.
[746] Christopher Dunn, Esq. et. al,, Complaint, *Tabbaa, et. al. v. Chertoff, et. al*., Case No. 005-CV-582S (U.S. Dis. Ct. for E.D.N.Y. 2005), p. 13.
[747] Frank James, "Muslims in U.S. Raise an Outcry Travelers Object to Border Security," Chicago Tribune (January 24, 2005) accessed at http://archives2005.ghazali.net/html/muslims_in_us_raise.html and at http://pqasb.pqarchiver.com/chicagotribune/access/782956181.html?dids=782956181:782956181&FMT=ABS&FMTS=ABS:FT&date=Jan+24%2C+2005&author=Frank+James%2C+Washington+Bureau&pub=Chicago+Tribune&edition=&startpage=1&desc=Muslims+in+U.S.+raise+an+outcry+ on 11/23/07.
[748] Aaron Mendelsohn, "Stranded at the Border," *The Spectrum* , Vol. 57, Is. 35 (February 9, 2005) accessed at http://spectrum.buffalo.edu/article.php?id=19132 on 10/25/07.
[749] Christopher Dunn, Esq. et. al,, Complaint, *Tabbaa, et. al. v. Chertoff, et. al*., Case No. 005-CV-582S (U.S. Dis. Ct. for E.D.N.Y. 2005), p. 19. *See* Abeer Rizek, even months' pregnant at time of the December

hijab. Upon her refusal, the agent inserted her fingers under the veil, searching the woman's head and behind her ears.[750] According to the government, these citizens were subjected to these measures based upon intelligence that terrorists might be using certain Islamic conferences held during that period as a cover.[751]

Reflecting upon their experiences, both Dr. Tabbaa and her son were filled with outrage about how the U.S. border agents had treated them just because they were observant Muslims who attended a religious conference.[752] As Dr. Tabbaa put it, "I felt so humiliated. I felt like we were treated as though all Muslims are guilty until proven innocent."[753]They felt that their authorities had violated their Constitutional rights as American citizens. At the very least, they had been denied the guarantee written on the face of their U.S. passports to "permit the citizen/national of the United States named herein to pass without hindrance or delay."[754] Knowing that they wanted to attend the Reviving the Islamic Spirit Conference the following year, they worried that if "its six hours now, maybe next time it will be six weeks and after that six months."[755] They voiced their concerns to the media and the story was picked up by the local press. Professors and students at the University of Buffalo shared their outrage over the Muslim border detentions with the wider community members.

26-27 border crossing of the Lewiston-Queenston Bridge "said that border agents lifted her blouse to ascertain that she was really pregnant." Jay Tokasz, "Local Muslims Troubled by Treatment at the Border." *Buffalo News* (1/31/05) accessed at http://groups.yahoo.com/group/NC4P/message/2044 on 7/21/2008 and referred to at http://www.danielpipes.org/blog_pf.php?id=393 accessed on 10/25/07.

[750]Christopher Dunn, Esq. et. al,, Complaint, *Tabbaa, et. al. v. Chertoff, et. al*., Case No. 005-CV-582S (U.S. Dis. Ct. for E.D.N.Y. 2005), p. 7.

[751] *See* Tabbaa v. Chertoff, 2005 U.S. Dist. LEXIS 38189 (U.S. Dist. W.D.N.Y. 2005), at pp. 6-7.

[752] Dr. Sawsan Tabbaa told one reporter, "I felt like we were treated as though all Muslims are guilty until proven innocent." Aaron Mendelsohn, "Stranded at the Border," *The Spectrum* , 2.

[753] Aaron Mendelsohn, "Stranded at the Border," *The Spectrum* , 2.

[754] Aaron Mendelsohn, "Stranded at the Border," *The Spectrum* , 2.

[755] Aaron Mendelsohn, "Stranded at the Border," *The Spectrum* , 2.

Attempting to calm the furor, the U.S. Department of Homeland Security sent their civil rights and liberties officer, Daniel Southerland, from Washington, D.C. to address the complaints in Buffalo. However, he failed to deliver any satisfying responses. During an April forum organized by the New York Muslim Public Affairs Council, he admitted that he and other members of the Department "felt very uncomfortable" about the reported treatment of Muslims by U.S. Customs and Border Protection agents, but stressed that border officials had made policy changes to prevent a repeat of the situation. While he was "confident what happened will not be a pattern," Southerland assured the crowd that he would take their concerns back to Washington. Those in attendance were extremely disappointed.[756]

K. *Tabbaa v. Chertoff* Filed in U.S. District Court

Shortly thereafter, the NYCLU, ACLU, and CAIR filed a suit on behalf of Dr. Tabbaa, her son Hassan Shibly, and three other plaintiffs in the federal district court. Originally filed in the Eastern District of New York on 20 April 2005, the case asserted that the heads of the Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) had violated the Plaintiff's rights under the First and Fourth Constitutional Amendments as well as the Religious Freedom Restoration Act (RFRA).[757] Later, the action would be amended to add a count alleging that the

[756] Jay Ray and Harold McNeil, "Border Detention is Focus of Forum: Muslim-Americans Question U.S. Official on Bridge Incident,' *Buffalo News* (4/06/05) accessed at http://archives 2005.ghazali.net/html/us-official-meets.html on 11/23/07and http://www.buffalonews.com/editorial/20050405/1069319.asp *See also* Carolyn Thompson, "U.S. Official Meets Muslims, But Fails to Explain Harassment at Border,' Canadian Broadcasting Corporation (4/06/05) accessed at accessed at http://archives 2005.ghazali.net/html/us-official-meets.html on 11/23/07. *See also* Carolyn Thompson, A.P., "5 Muslim-Americans Sue Homeland Security," *ABC News* (2006) accessed at http://abcnews.go.com/US/print?id=691623 on 4/10/06.
[757] U.S. CONST. amend. I & IV; Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. Sec. 2000bb, *et. seq.* (LEXIS 2005); *ruled unconstitutional* in *City of Boerne v. Flores*, 521 U.S. 507, at 536;

Defendants had exceeded their authority under the Administrative Procedures Act.[758] The Complaint requested relief in the form of a declaration that Defendants violated the Plaintiffs' rights, award of reasonable attorneys' fees and costs, an injunction to allow safe attendance of future religious conferences, an order to return all information unlawfully obtained at the border, and any further relief that the Court deemed appropriate.[759] At the press conference announcing the suit, ACLU Attorney Catherine Kim said,

> "The government cannot criminalize American citizens for their religious beliefs. Americans need to know that they can practice their religion and attend religious conferences without fear of government reprisals."[760]

Soon thereafter, the case was transferred to U.S. Judge William M. Skretny of the Western District of New York, who had first been appointed by President George H.W. Bush in 1990. Less than two years before being assigned the *Tabbaa Case*, Judge Skretny had sentenced five of the Lackawanna Six to the maximum sentence of ten years in

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117 S. Ct. 2157, at 2172; 138 L. Ed. 2d 624 (1997). Note that the Religious Freedom Restoration Act, represented Congress' response to the U.S. supreme Court's decision in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). In an attempt to to provide a higher level of protection for religious freedoms, Congress passed the RFRA to, lower standard of review for religious freedom cases from strict scrutiny to intermediate scrutiny. The Supreme Court rejected Congress' Act as an unconstitutional attempt to control the Court's standard of review. In Flores, the Supreme Court held that it reserved the right to "say what the law is." *City of Boerne v. Flores*, 521 U.S. 507, (1997), *at 536* (quoting Marbury v. Madison, 1 Cranch at 177).

[758] Administrative Procedures Act, 5 U.S.C § 706 (2) (C)

[759] Religious Freedom Restoration Act, 42 U.S.C. Sec. 2000bb, et. seq. *See* Christopher Dunn, Esq. et. al,, Complaint, *Tabbaa, et. al. v. Chertoff, et. al*., Case No. 005-CV-582S (U.S. Dis. Ct. for E.D.N.Y. 2005), p. 21-22. Regarding the Amended Complaint, *see* Tabbaa, et. al. v. Chertoff, et. al., 2005 U.S. Dist. LEXIS 38189 (U.S. Dist. Ct. for W. D.N.Y.12/21/2005), at p. 12.

[760] Catherine Kim, ACLU Staff Attorney quoted by ACLU Press Release, "Homeland Security Violates Civil Rights of Muslim American Citizens (4/20/05) accessed at http://www.aclu.org/safefree/general/17512prs20050420.html on 5/15/07.

federal prison for attending the Al Qaeda's Farooq training camp in the summer of 2001.[761]

All parties agreed to an expedited discovery and briefing schedule so that the case could be argued and decided prior to the December 23, 2005 commencement of the next Reviving the Islamic Spirit Conference. In keeping with this schedule, the Plaintiffs filed a Motion for Preliminary Injunction against future religious profiling at the border. Defendants filed a Motion for Summary Judgment which Plaintiffs moved to dismiss. Oral arguments were heard on these three motions on December 15, 2005. During the arguments, Plaintiffs' Attorney Chris Dunn demurred,

> "We fully respect the government's concerns about terrorism. That does not mean, however, that the constitution disappears at the border."[762]

In response, the Government's Lawyer Anthony Coppolino argued that,

> "The concern was not that they went to a religious conference. The concern was that individuals, money, documents or weapons were going to get smuggled across the border."[763]

From the bench, Judge Skretny questioned Attorney Dunn,

> "Aren't you really asking me to give your clients a free pass?"[764]

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[761] David Staba, "Qaeda Trainee Is Sentenced to 8-Year Term," New York Times (12/5/03) accessed at http://query.nytimes.com/gst/fullpage.html?res=9D07E2DC143DF936A35751C1A9659C8B63&n=Top/Reference/Times%20Topics/Organizations/A/Al%20Qaeda on 11/23/07. Upon sentencing, Judge William M. Skretny is reported to have told Defendant Yahya Goba, "Perhaps in your case, it is not long enough." David Staba, "Judge Questions Sentence in Al Qaeda Case," New York Times (12/11/03) accessed at http://query.nytimes.com/gst/fullpage.html?res=9804E0DE173CF932A25751C1A9659C8B63&n=Top/Reference/Times%20Topics/Organizations/A/Al%20Qaeda on 11/23/07.

[762] ___, "Muslim Group Asks U.S. Judge to Ban Border Searches Ahead of Toronto Conference," The Associated Press (December 15, 2005) accessed at http://www.newsday.com/news/local/wire/newyork/ny-bc-ny--muslimsstopped1215dec15,0,5876611.story?coll=ny-region-apnewyork and http://new.yahoo.com/s/press/20051215/ca_pr_on_na/us_cda_mulsims_stopped on 10/25/2007. See also http://www.jiltantislammonistor.org/article/id/1424 on 7/21/2008.

[763] Ibid.

[764] Ibid.

To this, Attorney Dunn responded,

> "It's not saying they can't be treated like everyone else. It's saying they can't be singled out [for their religion]."[765]

Six days later, Judge Skretny reached his decision. Granting Summary Judgment for the Government, the Court found that none of the Plaintiffs' rights had been violated during their detention at the Canadian-U.S. border. Specifically, the judge held that the border searches were routine and did not rise to a level of personal intrusiveness that would require reasonable suspicion. A body cavity search or x-ray might violate the Fourth Amendment, but it did "not shield entrants [Plaintiffs] from inconvenience or delay at the international border."[766] Judge Skretny also failed to find violations of the Plaintiffs' freedom of speech or assembly under the First Amendment. Rejecting their characterization of a "guilt by association' dragnet," the Court found the government to have used the least restrictive means to achieve its compelling interest to guard America's borders.[767] Asserting that "interception and detection at international border crossings is likely the most effective way to protect the U.S. from terrorists," the judge found that the Intelligence Driven Special Operation (IDSO) was "narrowly tailored to ensure that terrorists and those associated with terrorists would not enter the U.S."[768] He insisted that the government had not targeted everyone attempting to enter Canada or

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[765] Ibid.
[766] Tabbaa, et. al. v. Chertoff, et. al., 2005 U.S. Dist. LEXIS 38189 (U.S. Dist. Ct. for W. D.N.Y.12/21/2005), at 32-33, 34, 40.
[767] Tabbaa, et. al. v. Chertoff, et. al., 2005 U.S. Dist. LEXIS 38189, at 44-45.
[768] Tabbaa, et. al. v. Chertoff, et. al., 2005 U.S. Dist. LEXIS 38189, at 47. Note that an IDSO is a directive which instructs particular ports of entry to undertake special enforcement actions meeting specific intelligence concerns. *See* Ibid., at 8.

even all Muslims. Rather, it only targeted those persons "who the primary inspectors could confirm had attended the religious conferences at issue."[769]

Likewise, the Court found that the government did not violate the Plaintiffs' right to religious exercise under either the First Amendment or the Religious Freedom Restoration Act (RFRA).[770] Furthering its compelling interest at the nation's borders, the IDSO inspections did not target Plaintiffs because they had attended a religious conference or appeared to be Muslims. They were stopped "because they attended a particular conference" that the government feared would be used as "a cover to meet and exchange information, documents, money, and ideas about acts of terrorism."[771] According to the judge, any attendee of the conference would be subject to the IDSO regardless of their religion or ethnicity.[772] He concluded that the incident was "unfortunate" but not unconstitutional."[773]

Shibly and the other Plaintiffs immediately indicated their intent to appeal Judge Skretny's ruling.[774] The NCLU published online both a press release decrying the decision and an intake form for anyone detained after attending the 2005 RIS Conference. However, no further incidents occurred.[775]

On January 4, 2006, the NYCLU filed on behalf of the Plaintiffs/Appellants a notice of appeal to the United States Court of Appeals, Second Circuit. Both sides have filed

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[769] Tabbaa, et. al. v. Chertoff, et. al., 2005 U.S. Dist. LEXIS 38189, at 47.
[770] U.S. Const. Amend. I, Religious Freedom Restoration Act, 42U.S.C. Sec. 2000bb, et. seq.
[771] Tabbaa, et. al. v. Chertoff, et. al., 2005 U.S. Dist. LEXIS 38189, at 50-51.
[772] Tabbaa, et. al. v. Chertoff, et. al., 2005 U.S. Dist. LEXIS 38189, at 51.
[773] Tabbaa, et. al. v. Chertoff, et. al., No. 05-CV-582S, 2005 U.S. Dist. LEXIS 38189, at 53.
[774] Ibid.
[775] Shabina Khatri, "No Incidents for U.S. Muslims: Return from Canada Goes Smoothly," Detroit Free Press (12/28/05) accessed at http://www.accessmylibrary.com/coms2/summary_0286-12176953_ITM on 11/23/07. NYCLU press release and intake form accessed through http://religionclause.blogspot.com/2005/12/judge-refuses-to-prevent-border-stops.html accessed on 4/10/06.

their briefs before the Court. On appeal the Plaintiffs/Appellants were again represented jointly by attorneys from the NLYCLU, ACLU, and CAIR. In their Initial Brief, the Appellants again challenged that the government had misused national security concerns as a pretext to violate of their rights under the First and Fourth Amendments and the RFRA, as well as to exceed its authority under the and the Administrative Procedures Act.[776] Citing the testimony of CBP Official Robert Jacksta, the Appellants asserted that the intelligence underlying the IDSO was not specific to the 2004 RIS Conference nor disclosed any particular unlawful activity. Even given all reasonable inferences, it was based upon speculation of what "might happen." For this reason, the IDSO represented an "Islamic-conference dragnet" which swept too broadly to satisfy the First Amendment requirement that the government take the least restrictive means to protect the compelling government interest of national security. So, it violated the Appellants First Amendment and RFRA rights to freedom of association and religion.[777] Second, Appellants asserted that the District Court erred in finding the searches and seizures conducted upon them at the border "routine." CBP had subjected them to a high level security processing reserved for persons shown to be terrorist suspects.[778]

Throughout, the Appellants asserted that it was unlawful and unconstitutional for the government to penalize persons for their religious beliefs, associations, or involvements.[779] Even national defense "[can] not justify sweeping burdens on First Amendment activity" nor impose "guilt by/for association."[780] For these reasons, the

[776] U.S. CONS., Amends. I & IV; Religious Freedom Restoration Act, 42 U.S.C. Secs. 2000bb *et. seq.*; Administrative Procedures Act, 5. U.S.C. Secs. 551 *et. seq. See* Brief of Plaintiffs-Appellants Sawsan Tabbaa, et al., (2d Cir. U.S. App. Ct. Case No. 06-01190CV (filed 5/08/06), partially redacted, pp. i-ii.
[777] Brief of Plaintiffs-Appellants, at pp. 9-11, 19-20.
[778] Brief of Plaintiffs-Appellants, at pp. 20-21, 33.
[779] Brief of Plaintiffs-Appellants, at p. 26.
[780] Brief of Plaintiffs-Appellants, at pp. 27-28, 30.

government's policies enforced upon the Appellants exceeded its DHS statutory authority and thus, violated the Administrative Security Act.[781] For these reasons, Appellants requested reversal of the Summary Judgment which the District Court previously had granted in the government's favor.[782]

In response, the Brief of Appellees from DHS and CBP asserted that their statutory mandate and highest priority was to prevent terrorists and their weapons from entering the U.S.[783] As part of this responsibility, they possessed broad authority to detain and inspect persons, vehicles, and possessions at the border. Further, they were authorized to verify without warrant the identity and purposes of persons seeking entry into the U.S. Their standard operating procedures included the discretion to refer individuals for a secondary, detailed inspection. Appellees clarified that biometric data gathered upon U.S. citizens for these purposes was automatically purged from the government computer data base within 7 days.[784] Based upon classified information related to this conference, the Appellees justified their search measures, including kicking plaintiffs' feet apart and performing pat downs for weapons.[785]

Appellees continued to assert that their measures were non-intrusive and narrowly tailored to compelling national security interests. As such, it did not violate Appellants' rights under the First or Fourth Constitutional Amendments or the RFRA.[786] Finally, the Government asserted that the CBP possessed clear statutory authority for all their actions

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[781] Brief of Plaintiffs-Appellants, at pp. 21, 54, 55-56, 57-59 61.
[782] Brief of Plaintiffs-Appellants, at p. 62.
[783] Brief for the Appellees. *Tabbaa, et. al. v. Chertoff, et. al.* (2d Cir. U.S. App. Ct. Case No. 06-01190CV (filed 6/07/07), pp 3-4; citing 6 U.S.C. Sec. 202 (1), (2), (4), & (6).
[784] Brief for Appellees, pp. 4-6. 28; *See* 8 U.S.C. Sec 1225 (b)(2)(A) and 8 C.F.R. Sec. 235.1 (b); 19 U.S.C. Sec. 1589a(2) & (3); 19 U.S.C. Sec. 1581 (a) and 19 U.S.C. Secs. 1455, 1461, 1467, 1582.
[785] Brief for Appellees, pp. 8, ftn. 5; 9-10, 14.
[786] Brief for Appellees, pp. 18-19.

affecting the Appellants at the border.[787] On these bases, Appellees requested that the Circuit Court either dismiss the appeal as moot or affirm the District Court's Summary Judgment to the United States.[788]

The Appellants answered with a Reply Brief that squarely denounced the Government's misstatement of facts and denied that there was any basis for dismissal of their appeal. Specifically, the Government applied heightened security to the Appellants based upon vague intelligence that someone associated with terrorist activities or organizations had attended Islamic conferences prior to 2004 and thus, might attend the 2004 RIS Conference. [789] Further, CBP Official Jacksta had agreed in deposition that it was "solely their attendance [at December 2004 Islamic conferences] that would subject them to the secondary inspection."[790] The Government continued to characterize the special terrorist processing as "routine" despite the fact that Appellants, as law abiding U.S. citizens, would not have been subjected to such protocols without the ISDO.[791]

Because appellate courts sitting in review of Summary Judgments must resolve all ambiguities and draw all inferences in favor of the nonmoving party, the Appellants' appeal was not subject to dismissal. Again, the Appellant reminded the Circuit Court of the Government's violations of their rights and overstepping of its own authority. In essence, the religious rights of lawful, U.S. citizens do not end at the U.S. border.

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[787] Brief for Appellees, pp.20, 58-61. 6 U.S.C. Sec. 202 (1), (2) & (3); 8 U.S.C. Sec 1225 (b); 19 U.S.C. Sec. 1589 a(s) & (3); 19 U.S.C. Sec. 1581 (a); and 19 U.S.C. Secs. 482, 1455, 1461, 1467, 1582 and 19 C.F.R. pt. 162.
[788] Brief for Appellees, ;p. 62.
[789] Reply Brief of Plaintiffs-Appellants Sawsan Tabbaa, et al., (2d Cir. U.S. App. Ct. Case No. 06-01190CV (filed 6/21/06), pp. i-ii, 1-4; 5-6; 6 et. sq.
[790]Reply Brief of Plaintiffs-Appellants, p. 3.
[791] Reply Brief of Plaintiffs-Appellants, p.4.

Americans can not be criminalized or discriminated against because of their religious affiliations by their own government.[792]

At oral argument on April 19, 2007, Christopher Dunn argued that the government had unconstitutionally targeted his clients for aggressive inspection solely because of their religious identity and affiliations. Pronouncing the inspections as more than "just going through someone's bags," Dunn argued that "[t]his sort of guilt-by-association approach … is not constituent with the First Amendment."[793] Admitting that the stops were ill handled, the Government's Attorney Lewis Yelin replied that the Appellants were not singled out because they were Muslims. Rather, they were searched because classified intelligence indicated that some people attending the conference might pose problems. In response, Circuit Judge Rosemary Pooler inquired,

> "Doesn't this look like profiling of Muslim-American citizens as they enter this country?"[794]

Yelin assured her that even a non-Muslim CNN anchorman would have been searched if he had attended the RIS Conference. Yelin was quick to assert that the Government had modified its procedures for mass inspections since this incident and now require a senior supervisor to be involved whenever someone is detained over two hours.[795]

For these past eight months, the case remained undecided. However, the Tabbaa/Shibly family continued to be hopeful. No matter the result, Hassan Shibly insisted:

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[792] Reply Brief of Plaintiffs-Appellants, pp. 11-12, 14, 32-33.
[793] Associated Press, "Court Weights Border Stops of American Muslims who Attended Islamic Conference in Canada," International Herald Tribune (4/19/07), p. 1 accessed at http://www.iht.com/articles/ap/2007/04/19/america/NA-GEN-US-Muslims-Stopped.php on 11/23/07.
[794] Associated Press, "Court Weights Border Stops of American Muslims," p. 1.
[795] Associated Press, "Court Weights Border Stops of American Muslims,' pp. 1-2.

> "It was not a wasted effort. We got a victory in the sense that awareness was raised. We got support from the community, and we did not have it happen again."[796]

Asked if he will ever confront the government again, Hassan Shibly replied,

> "I am not discouraged. This is why you come to America to escape these things. We're American citizens. Forget the fact that we're Muslims. What they did, they did to American citizens. It could happen to anyone."[797]

Both parents and Hassan Shibly regularly accepted speaking engagements that educate others about their Muslim faith, bridge East-West cultures, and promote interfaith understanding. [798] They regularly asserted their allegiance as American citizens and their commitment to secure religious liberty under the Constitution..[799]

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[796] Ahearn, "A Stranger in His Homeland," *Generation*, p. 5.

[797] Ahearn, "A Stranger in His Homeland," *Generation*, p. 5.

[798] Dr. Othman Shibly helped lead a November 1, 2001 discussions hosted at SUNY-UB in an attempt to bring understanding after the 9/11 attacks. ___, "Faculty to Discuss Terrorist Attacks," UB Reporter, Vol. 33, No. 8 (Oct. 25, 2001) accessed at http://www.buffalo.edu/reporter/vol33/vol33n8/briefly.html on 11/22/07. Dr. Sawsan Tabbaa regularly educates her fellow citizens about Islamic culture and engages in Interfaith activities. ___,"Professor of Dental Medicine Lectures on Post-9/11 Situation During Visit to Middle East," *UB International* Vol. XII, No. 1 (Spring 2003), p. 14 http://inted.oie.buffalo.edu/news/ubints03.pdf accessed on 11/22/07.)
As a student at SUNY-UB, Hasan Shibly continues to speak out about his past experiences, inform others about the value of American ideals and rights, as well as educate others about Islam. Ahearn, "A Stranger in His Homeland," p. 1. Christopher Ahearn, "A Stranger in His Homeland," *Generation* (Buffalo, NY: Sub-board I, Inc.2005) , p. 1 *accessed at* http://www.subboard.com/generation/articles/113866225079927.asp on 10/25/07.Timothy Lowden and Chris Pelletier with Jacob Drum, "American Like You," *Generation* (Buffalo, NY: Sub-board I, Inc.2005), p. 2 accessed at http://www.subboard.com/generation/articles/110963178942550.asp accessed on 10/27/07.

[799] In the past, Dr. Othman Shibly has been recognized for helping to lead a Nov. 1, 2001 discussion hosted at SUNY-UB in an attempt to bring understanding after the 9/11 attacks. ___, "Faculty to Discuss Terrorist Attacks," UB Reporter, Vol. 33, No. 8 (Oct. 25, 2001) accessed at http://www.buffalo.edu/reporter/vol33/vol33n8/briefly.html on 11/22/07.
While on a 2003 SUNY-UP sponsored academic visit to Beirut Arab University in Lebanon and Damascus University in Syrian, Dr. Shibly lectured in the region about the 9/11 Tragedy and the supportive situation at SUNY-UB after the tragedy. He asserted,

> "My goal in these presentations was to emphasize the human tragedy of the terrorist attacks and their aftermath. My message was clear: We are all one family and all part of the same human race. I concluded from my visit that people in the

What motivates the family's active civic and political participation? It was their dedication to their religious values and their commitment to American ideals. Together, they call fellow citizens to vigilance. As Hassan Shibly has said,

> "Taking away [Muslims'] rights little by little is what worries us. [When] is that going to end?
>
> If it can happen to me it can happen to you. That's why we should make sure our civil rights aren't being trampled on."[800]

L. U.S. Second Circuit Affirms in Dicta-Constitutional Rights Exist at the Border

On November 26, 2007, the U.S. Court of Appeals for the Second Circuit found that the petitioners possessed constitutionally protected Fourth and First Amendment rights at the U.S. border.[801] Granted, the Government had broad powers to conduct suspiciounless searches at that sensitive location. However, the searches still had to be routine.[802] More importantly for our purposes, the Circuit judges ruled that the Tabbaa party had the unquestionable First Amendment liberties to religious free exercise and to express

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> Middle East and the U.S. share many of the same values and principles. We both love freedom and justice. We both hope for peace on earth."

___,"Professor of Dental Medicine Lectures on Post-9/11 Situation During Visit to Middle East," *UB International* Vol. XII, No. 1 (Spring 2003), p. 14 http://inted.oie.buffalo.edu/news/ubints03.pdf accessed on 11/22/07.

Recently, Drs. Shibly and Tabbaa were recognized for their program supervising the SUNY-UB dental student outreach program in Cairo, Egypt/Damascus, Syria in 2005-2006. *See* Dental Report ((University of New York at Buffalo, School of Dentistry: September 2006), p. 7 accessed at http://ubdentalalumni.com/site/files/newsletter/2007.01.30.2006sept.dentalreport.pdf accessed on 11/22/07.)

[800] Lowden, Pelletier, Drum, "American Like You," *Generation*, p. 4.
[801] *Tabbaa v. Chertoff*, 509 F.3d 89, at 98, 101 (2d Cir. 2007). U.S. CONS. amend I & 4.
[802] Ibid., at 98.

themselves through association at the RIS Conference."[803] Such rights, the Court observed, were "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression of the majority."[804]

The Circuit Court moved to evaluate the Appellants' claims in light of the U.S. Government's interest in protecting its international border.[805] They quickly dismissed any questions regarding the scope of the CBP's powers or their records expungement after use of the information gathered from the Appellants.[806] Next, the judges considered the Appellants' claimed Fourth Amendment violations of their right against unreasonable searches and seizures. Having already expressed sympathy for the Tabbaa parties' rough treatment at the hands of the CBP, the Court stated that it was not unreasonable for the Appellants to have felt stigmatized by the search. Indeed, by being so detained, they had "suffered a significant penalty" in relation to their First Amendment Rights.[807]

Still the U.S. Government had claimed that it had received credible reports that terrorists that raised "specific concerns about certain national and international conferences, that included the RIS which Appellants' attended in Canada.[808] For this reason, the Court performed an *ex parte* and *in camera* review of the classified intelligence underlying the Government's heightened security procedures. In a footnote, the federal appellate judges confirmed that these reports revealed that the U.S. Customs and Border Patrol (CBP) had reason to believe known terrorists would attend the RIS Conference.[809]

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[803] *Tabbaa v. Chertoff,* 509 F.3d 89, at 101, 105 (2d Cir. 2007).
[804] Ibid., at 101.
[805] *Tabbaa, et. al. v. Chertoff, et. al.* , 509 F. 3d 89, (U.S. 2d Cir. 2007), at 98-99, 102.
[806] Ibid., at 96-97.
[807] Ibid., at 98, 102.
[808] Ibid., at 93.
[809] *Tabbaa, et. al. v. Chertoff, et. al.* , 509 F. 3d 89, (U.S. 2d Cir. 2007), at 93, ftn. 1.

So, the Second Circuit determined to weigh the Appellants Fourth Amendment unreasonable search and seizure claims of liberty violations against the Government's interest in protecting the nation's borders. While acknowledging that the Appellants were "undoubtedly made uncomfortable and angry by the searches,"[810] the Judges did not believe that their border detention of approximately six hours were excessive. The Judges believed that the CBP's attempts to check identification, search cars, and compare fingerprints and photographs were not only routine, but within common sense parameters given information that terrorists were planning to use others' passports and documents. Under the legitimate directives of the Intelligence Driven Special Operation (IDSO), the CBP was following established procedures.[811] The CBP was simply acting upon its express mandate to "prevent terrorist attacks within the U.S." and "reduce the vulnerability of the U.S."[812]

Regarding Appellants Shibly and Rizek's claims that their feet had been kicked open and almost knocked to the floor, the Judges replied with precedent. Citing *the Ramsey Case,* the Court admonished that "border crossers cannot, by their own noncompliance, turn an otherwise routine search into a non-routine one."[813] Even given the cumulative affect of all that Appellants endured, the Court refused to accept their characterization of CBP's treatment as "terrorist-style processing". Rather, the Second Circuit found that Appellants received "routine treatment."[814] For this reason, the appellate judges did not find an excessive invasion of privacy or nonroutine delay. They upheld all elements of

[810] Ibid., at 98.
[811] *Tabbaa, et. al. v. Chertoff, et. al.*, 509 F. 3d 89, at 99-101. *Tabbaa v. Chertoff,* No. 05-CV-582S, 2005 U.S. Dist. LEXIS 38189 (W.D.N.Y. Dec. 21, 2005), aff'd, 509 F.3d 89 (2d Cir. 2007).
[812] Ibid. 97, 103-104. *See* 6 U.S. C. Sec. 111 (b) 1(1) & Sec. 202 (1) (2002).
[813] Ibid. 100, citing *Ramsey*, 431 U.S. at 616.
[814] Ibid., at 98-101.

the border search routine, even if some approached permissive limits. Thus, the Court found no violation of the Tabbaa parties' Fourth Amendment rights.[815]

Next, the Second Circuit weighed the Appellants' First Amendment Rights against the interests of the government. First, they considered the Tabbaa parties' protected right to free association at the religious conference. The Court emphasized that the Appellants' rights fell squarely within the types of religious and cultural associations protected by the First Amendment.[816] The judges quickly rebuffed the Government's argument that they only "incidentally interfered with the Appellants' associational rights."[817] No – the Government could and did substantially interfere with the Appellant's ability to associate at similar conferences. And, the government's actions "could reasonably deter others from associating at similar [religious] conferences."[818] It did so by treating them in a way that created fear of being singled out by border guards in the future. As a result, they suffered a "significant penalty or disability."[819] The Appellants' heavy burden could only be offset by a compelling government interest, unrelated to the suppression of their associational liberties, applied by less restrictive means.[820]

The Government could show both. It had a very compelling interest in protecting the security of the nation's borders from terrorism. Also, the means the CBP utilized were not only unrelated to the suppression of ideas, but likely the means most effective to prevent terrorists and their instruments from infiltrating the U.S. border. Based upon certain intelligence, the CBP had ample reason to implement the Intelligence Driven

[815] *Tabbaa, et. al. v. Chertoff, et.al.,* 509 F. 3d 89, at 101.
[816] Ibid., at 101.
[817] Ibid., at 101.
[818] Ibid., at. 101.
[819] Ibid., at 101-102.
[820] Ibid., at 103.

Special Operation (ISDO) received from its superiors. In the end, the Court found the Government's national security concerns were more compelling than then Appellants' claimed violations to their liberty. In fact, the Court found that the CBP had used the least restrictive means to achieve its government assigned objective of protecting the U.S. from terrorism[821].The appellate judges ruled that the Government had showed that its interests could not be achieved by means less restrictive. The Circuit Court easily affirmed Judge Skretny's summary judgment that the Government's interests outweighed the Tabbaa parties' association claim.[822]

At last, the Circuit Court was ready to consider the Appellants' religious free exercise claim under the Religious Freedom Restoration Act and the First Amendment.[823] Noting that the free exercise clause requires the application of a strict scrutiny test, the Court reaffirmed the Government's compelling interest and turned to consider if the government had used the least restrictive means to effectuate it. But, the Court spent hardly anytime on the issue. The Court noted that the Government's security interests were "at their zenith at the international border."[824] Relying upon cases dealing with the security judgments of prison officials, the Second Circuit decided to extend similar deference to the CBP. Admitting that the border context is "far from analogous to the concerns faced by prison officials," the Court nevertheless refused to substitute its judgment for that of the CBP in light of their "extensive expertise in securing the border."[825] Thus, even under heightened scrutiny, the Court found that the Government's

[821] *Tabbaa, et. al. v. Chertoff, et.al.,* 509 F. 3d 89, at 103- 105.
[822] Ibid., at 105.
[823] Religious Freedom Restoration Act, 42 U.S.C. sec. 2000bb-1 and U.S. CONS., amend. I.
[824] Ibid, at 106.
[825] Ibid., at 106.

national security concerns outweighed the Tabbaa parties' claims for religious freedom and free exercise.

In the end, the Second Circuit returned a unanimous decision affirming Judge Skretny's earlier decision. Writing on behalf of the Bench, Circuit Judge Straub indicated that they could find no violation of the Plaintiffs' rights under the First and Fourth Amendments, the Religious Freedom Restoration Act (RFRA) or any actions of the U.S. Bureau of Customs & Border Patrol (CBP) exceeding its authority under the Administrative Procedure Act (APA).[826] In scrutinizing the governments activities, the Circuit Court had given great deference to the "CBP's expertise in securing the border" and approved their activities as necessary protective measures.[827]

The U.S. Second Circuit's affirmation of the federal district court's earlier denial of the Plaintiffs' summary judgment motion, particularly over sensitive issues of border security, made further appeal undesirable. Discussing the specter of future appeal with his clients, NYCLU Lead Attorney Christopher Dunn highlighted the achievement of securing the appellate court's affirmation that First Amendment rights existed at the border. This legal advance could be jeopardized by bringing the case before the U.S. Supreme Court. In the current political climate, Muslim American religious rights were being overshadowed by fears concerning domestic security. The border remained the key interdiction point for interception of terrorists, further strengthening the claims of Chertoff and Homeland Security.[828]

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[826] *Tabbaa, et. al. v. Chertoff, et.al.,* 509 F. 3d 89, at 107; 2007 U.S. App. LEXIS 27258, 1 at 47 (2007)
[827] *Tabbaa, et. al. v. Chertoff, et.al.,* 509 F. 3d 89, at 106-107.
[828] Christopher Dunn, Esq., telephone interview by author (conducted New York Office of NYCLU–Atlanta at 9:00 a.m. on 4/9/2008).

Given the existing composition of the Supreme Court, the Appellants' legal team was not optimistic regarding future rulings – not to mention the adverse publicity which the Muslim American community would likely suffer. Conservative websites and reactionary blogs already were spinning the Tabbaa litigation story as a Muslim attempt to manipulate American rights and civic norms in an attempt to undermine national security. Too many were unable to recognize the American idealism and constitutional concerns that motivated the Tabbaa, Shibley, and the other appellants. Based upon these factors, Tabbaa, Shibley, and their cohort agreed with their attorneys' assessment. They decided not to appeal the matter to the U.S. Supreme Court.[829]

Although *Tabbaa v. Chertoff* did not become the anticipated fulcrum case for Muslim American participation, it remains a significant indicator of their current citizenship status. The case demonstrates the Muslim American embrace of U.S. constitutional norms and citizenship ideals. At the same time, it reveals that some of their fellow citizens question their patriotism and their motives. The Tabbaa Appellants identified themselves as American citizens whose rights to religious liberty and freedom of assembly had been violated by their government. In response, they first sought to present their concerns to Homeland Security officials in a public forum.[830]

Failing to receive either official acknowledgment or redress of their constitutional rights, they pursued the established avenues for legal redress. All the while, the litigants engaged in vigorous public education and civic activities designed both to teach their fellow Americans about the tenets of Islam and to demonstrate how current national

[829] Christopher Dunn, Esq., telephone interview by author (conducted New York Office of NYCLU–Atlanta at 9:00 a.m. on 4/9/2008).
[830] Carolyn Thompson, "5 Muslim-Americans Sue Homeland Security," *The Associated Press* (ABC News Internet Ventures 2006) accessed at http://abcnews.go.com?US?print?id=691623 on 4/10/2006.

security policy violated their constitutional rights. In the face of an adverse federal district court ruling, they never lost faith in the American justice system. Rather, they appealed to the federal circuit court. The decision which they received was the first general acknowledgment that all citizens' retain their rights at the border. However, in weighing their situation, the court did not provide the litigants with the redress which they sought.

The Tabbaa Appellants' decision against further appeal secured these rights against potential U.S. Supreme Court reversal. The impact of their case has been a strengthening of citizenship rights for all Americans. Further, the Second Circuit Decision represents an acknowledgment that Muslim Americans have endured unfair stigmatization by Homeland Security which interferes with their First Amendment rights. In protecting the nation from terrorism, the federal appellate court admonished security officials to exhibit human respect toward their fellow citizens and to use common sense when conducting boarder searches. While the Court did not find that government treatment of the Tabbaa Appellants had risen to an actionable violation, their opinion warned that it was near "the outward limits of what is permissible absent reasonable suspicions."[831] Through their legal participation, the Tabbaa litigants had succeeded in receiving federal court confirmation of citizens' rights at the borderline and the establishment of judicial limits upon Homeland Security border policies.

M. Muslim Participation & American Citizenship

Increasingly, Muslim Americans are becoming civically active and politically engaged. Driven to overcome mounting discrimination, they are participating in record

[831] *Tabbaa, et. al. v. Chertoff, et.al.*, 509 F. 3d 89 (2d Cir. 2007), at 99.

numbers within the United States. Through observation and experience, they have learned from the previous struggles of other American religious minorities. Even a cursory review of their activities reveals that U.S. Muslims exhibit the foundational elements reflected in our American citizenship model.

Having embraced the ideals and freedoms of life in the United States, Muslim Americans are asserting their rights and affirming their citizenship. Focusing their *zakat* and service increasingly upon the U.S., they are demonstrating that they understand and meet their duties as American citizens. As Muslims and Americans, they are defining new modes of membership that enrich both societies. Already active in organizational efforts, U.S. Muslims are engaged in record numbers.[832] And, their civic involvement is pushing their religious community into the American mainstream.

Referring to our citizenship model, political participation constitutes the cutting edge by which Muslim Americans are defining their U.S. citizenship and forging their unique religious adaptation to American society. The civic activism of Islamic Americans demonstrates their sincere belief in the country's foundational principles as well as genuine trust in the established political and legal processes. Already active before September 11, Muslim Americans have since demonstrated their trust in religious liberty by undertaking an unprecedented effort to reach out and educate their fellow citizens about their Islamic faith. Concurrently, they continue their effort to create *umma* (the community of faith) in America by redefining their religion and establishing theological schools within the U.S. context. Many assert their democratic right to peacefully

[832] Bagby, "Isolate, Insulate, Assimilate," pp. 38-40; Prothero, "Introduction," pp. 11-12 ; Abdo, pp. 134, 190; Smith, *Islam in Americ*a, p. 185. Note that Diana Eck insists, "Muslims increasingly participate in American public life. Participation is, after all, the critical element in the construction of a pluralistic, democratic society." Eck, *A New Religious America,* p. 361.

assemble in protest over discriminatory domestic policies and oppressive foreign wars. Muslim Americans engage the political process through voter registration drives, political campaigning, fund raising, and participation in political coalitions. Others, like Tabbaa, file suit to legally establish their Constitutional and statutory rights. Making their voices heard in the Capital, protesting in the public square, and asserting their rights in the court system, Muslim Americans lay claim to their freedoms of religion, speech, and assembly even as they model liberal democratic practice. All this translates into a level of Muslim citizens' political participation which exceeds that of any other recent immigrant group.[833]

Through their participation in American society, Muslim Americans are completing our conceptual model of U.S. citizenship. Asserting their unique Islamic identity, they understandably have asserted their right to refuse assimilation and to resist coerced conformity. Yet, their civic engagement signals fulfillment of their civic duties and their genuine integration as members of the American citizenry. U.S. Muslims are at a critical stage in the negotiation of their religious and national identities.[834] As history has demonstrated, the decisions made by the federal courts and their fellow citizens can assist or impede their participation in American society.

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[833] *See* Bagby, "Isolate, Insulate, Assimilate," p. 32; Louise Cainkar, "The Impact of the September 11 Attacks and their Aftermath on Arab Muslim Communities in the United States," GSC Quarterly (Summer/Fall 2004), at p. 14 accessed at http://www.ssrc.org on 11/9/2007; *See also* Eck, pp. 360-363; Smith, Islam in America, p. 167, 179. *See also* Alexander Rose, "How Did Muslims Vote in 2000," The Middle East Quarterly, Vol. VIII, No. 3 (Summer 2001) accessed at http://www.meforum.org/article/13 on 7/21/2008.

[834] Bagby, "Isolate, Insulate, Assimilate," p. 37; Smith, *Islam in Americ*a, p. 179.

Chapter 7: Conclusion

American citizenship norms have been shaped by the historic adaptations reached by minority religions and the majority reactions which they evoked. Often, majority objections to faith community idiosyncrasies have forced adjudication of minority claims within the judicial forums offered by the dominant legal order. As the chief moral arbiter of secular government, the United States Supreme Court has been called upon repeatedly to decide the parameters of accommodation to be reached between unpopular minorities and the public majority. At times, the Court has referenced the constitutional guarantees of religious freedom in championing the religious minority. In both the *Dartmouth College Case*[835] and the *Pierce Case*,[836] the Supreme Court upheld the rights of Protestant evangelicals under state charter and affirmed the patriotism of Catholic parents who chose parochial schools for their children. In both cases, faith communities were permitted to pursue their own distinctive religious aims within foundational social institutions.

Other cases have revealed the country's highest court weighing civic aims above minority religious claims. In *Braunfeld*,[837] the Supreme Court affirmed the legislative enactment of a common day of rest enforced to compel Sunday business closings despite its interruption of Orthodox Jewish business practices. Just recently, the U.S. Second Circuit Court of Appeals decision in the *Tabbaa Case*[838] upheld federal border security policy over Muslim-American legal claims of religious profiling and heightened investigation. Both instances revealed how federal appellate courts are called to weigh

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[835] *Trustees of Dartmouth College vs. Woodward*, 17 U.S. (4 Wheat) 518, 4 L. Ed. 629 (1819).
[836] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).
[837] *Braunfeld v. Brown*, 366 U.S. 599, at 607-609, 81 S. Ct. 1144, at 1148-1149, 6 L. Ed. 2d 563 (1961).
[838] *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007).

the membership interests of the general American citizenry against the Constitutional violations claimed by minority religious communities. Conflicting claims over basic elements of citizenship are inherent within these legal contests.

Observations concerning the examined cases shaped the citizenship models developed in this dissertation.[839] Application of these models helps to identify the particular factors active in each dispute and to clarify the basis for the Supreme Court's decision. Although they remain mere illustrations, these models facilitate the understanding of citizenship's crucial elements and the historical process through which these components have interacted, slowly leading to more inclusive forms of democratic citizenship.

American history demonstrates that far from being feared, minority religious communities may be appreciated as instigators of positive change and harbingers of alternative values which enrich society. Historic and sociological examination of these religious cases provides evidence that the challenges mounted by minority religious communities have helped safeguard the constitutional liberties of all citizens and have contributed to widening American social acceptance of diversity. Assertion of their claims in First Amendment religious terms garnered the attention of judicial authorities. In turn, civic airing of their faith beliefs and practices has raised public awareness and elicited common respect even in the face of contrary court rulings. Religion, it appears, has the capacity to offer a less threatening platform upon which to openly explore differences and a more conducive opportunity to incorporate diverse populations into

[839] These citizenship models were developed specifically as tools to understand and evaluate developing U.S. citizenship norms. In this dissertation, the relevant context is national and the model is applied to the implementation of civil rights and development of inclusive membership within our American nation-state. However, it is conceivable that these models may be adapted to other contexts in which distinct democratic citizenship values unfold. In that case, the model could be applied to help explain distinct citizenship values in another democratic nation-state or to explain/strengthen universal human rights in the context of global citizenship.

U.S. citizenry. It is hoped that such understanding may set the stage for a welcoming of Islam, an integration of Muslim and American values, and a further expansion of U.S. citizenship norms.

This conclusion will first reflect upon the legal decisions discussed in the previous chapters. Then, it will apply the two, three and four dimensional citizenship models introduced in Chapter 2. Particular care will be taken to explore the contributions of U.S. Supreme Court decisions to the development of American citizenship norms as well as the rulings' effects upon religious minority incorporation as full members of the U.S. society. The social effect of minority religious communities' challenges to American values such as negative rights, individualism, and consumerism also will be investigated.

Throughout the analysis, the broader historical and sociological contexts of the subject case will be considered as crucial lenses for the interpretation of judicial rulings and for the comprehension of the American citizenship tradition. Attention will be paid to the evolution of American citizenship ideals beyond tolerance, inclusion, and acceptance toward active, integrative modes of interfaith dialogue and cooperative engagement. American citizenship values are evolving. Policy recommendations for Muslim integration will be made, followed by an examination of the unique promise offered by evolving American citizenship values. We will see how principles established under the U.S. Constitution encourage movement of citizenship norms toward active interfaith cooperation to build understanding of difference and a more common social order.

A. Shaping Citizenship Norms: Minority Religion & the U.S. Supreme Court

The U.S. Supreme Court is the final authority determining the law of the land.[840] In our religiously plural yet secular society, the high court also functions as the moral arbiter of civic values. First Amendment guarantees against religious establishment coupled with the separation of church and state assure that no one religious voice may define American social standards. Rather, it is the Justices who decide the most controversial public disputes. Because no litigant is entitled to more than a single trial and one review, the Justices have the power to selectively hear only those cases of the greatest civic importance.[841] As a common law court functioning in a democracy, the Court must find and give reasons for its decisions which both establish and legitimate the law through appeal to established legal precedent and common moral values. Thus, the U.S. Supreme Court's decisions not only determine our nation's law but define its civic norms.[842]

Minority religious communities continue to bring important legal challenges against American practices denying them full inclusion. In resolving these disputes, the U.S. Supreme Court establishes the civic normative content of citizenship elements of rights, duties, membership and participation through legal precedent.

The focus of this work has been key historic challenges to American citizenship presented before the U.S. Supreme Court by religious minorities. As the cases progress,

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[840] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803); *Cooper v. Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). *See* Sandra Day O'Connor, *The Majesty of the Law* (New York: Random House 2003), pp. 242-244; Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago, 4th ed. 2005), p. 257.

[841] *See* William Howard Taft, testimony, in Hearings before the Committee on the Judiciary: House of Representatives, on H.R. 10479, "Jurisdiction of Circuit Courts of Appeals and United States Supreme Court," 67thCongress, 2nd session, March 30, 1922, 2 *cited by* Ronald B. Flowers, *That Godless Court?* (Louisville, KY: Westminster John Knox Press 2005), p. 3.

[842] *See* Robert Bellah and Phillip E. Hammond, *Varieties of Civil Religion* (San Francisco: Harper San Francisco 1982), Chapter 6 *accessed on web at* http://www.religion-online.org/showchapter.asp?title=3041&C=2606 on 12/20/2007.

the foundational issue of citizenship may be seen to move from rights to duty to membership to participation. The importance of each citizenship element is underscored by the U.S. Supreme Court as it determines their meaning and complexity within the context of specific historic cases brought by religious minorities. Each U.S. Supreme Court decision has been selected because it represents a fulcrum which shifts the balance of change either towards or away from fuller integration of the particular religious minority as American citizens. A brief recitation of the U.S. Supreme Court decisions and their affect upon the four citizenship elements follows.

(i) Rights:

American citizenship was founded upon the concept of negative rights advocated by Jefferson and established under the U.S. Constitution. The Bill of Rights extended the rights against government interference to include disestablishment and the free exercise of religion. Soon thereafter, the U.S. Supreme Court under Chief Justice John Marshall struggled to decide a controversy over the Dartmouth charter between two Protestant trustee factions in a manner consistent with the First Amendment. Writing for a unanimous Supreme Court, Chief Justice Marshall insisted that private college charters were contracts between governments and non-charitable corporations. These written agreements would be legally enforced regardless of religious affiliation. In this manner, the U.S. Supreme Court reached an equitable resolution to the dispute without establishing/ preferring a religion or interfering with its free exercise.

The *Dartmouth College Trustees Case* established the precedent that all churches, whether traditional Protestant institutions or Evangelical groups, would be treated equally

under the law once established as private eleemosynary corporations.[843] The U.S. Supreme Court would not inquire into religious doctrine nor judge conflicts on the basis of belief. Rather, American courts would decide legal cases through equal application of the laws as the U.S. Constitution dictated - without reference to faith or creed.

The *Dartmouth College Trustees* involves the tension surrounding **rights** and their intersection with conflicting participation claims. The facts involve a dispute between liberal and evangelical Protestants for governance of Dartmouth College. A theological struggle between liberal principles of individual freedom and evangelical values of Christian restraint was the basis of the conflict over college administration.

This dispute involved competing claims for both religious rights and collective participation. Initially, liberal Protestants attempted to circumvent the evangelical Board of Trustees' replacement of the more liberal President of Dartmouth College and to appoint a majority of Liberal trustees. At first, the liberals proved successful by enacting legislation that changed the school's existing charter and stacked the Dartmouth College Board of Trustees. The original evangelical Trustees brought suit seeking to force the Secretary-Treasurer to relinquish the corporate records, seal and property. Through this litigation, the evangelicals attempted to continue their participation and to preserve their control over the direction of the college. In treating the Dartmouth College Board of Trustees as a non-profit corporation, the U.S. Supreme Court affirmed that it would extend equal **rights** to all Protestant groups and treat each with equanimity regardless of their interpretive doctrines. Charges of Protestant heresy would not be considered, much less influence federal courts sworn to uphold the First Amendment. Through the

[843] *Dartmouth College vs. Woodward*, 17 U.S. (4 Wheat) 518 (1819), at 637, 644-648. An eleesymosynary corporation is one that involves the distribution of charity or alms. *Black's Law Dictionary*, H.C. Black, ed. (St. Paul, MN: West Publishing 1951, 4th ed.), p. 611.

Dartmouth College Decision, the U.S. Supreme Court established the precedent that rights not religion would hold sway before federal courts. America's courts would be dedicated to constitutional law, not doctrinal orthodoxy. The Supreme Court's hands-off approach to religion sustained growing national religious diversity and supported increasing public toleration for faith differences.

Although the main tension involved the intersection of rights and duties, the Dartmouth Trustees Case also touched upon issues of duty and membership. Inherent in the liberal claims against the evangelical Board of Trustees were charges that it was not upholding American Revolutionary ideals of individual liberty. Instead, the Board was forcing students to attend religious services and to follow Christian conduct codes. In reply, the evangelical Board insisted that liberals were undermining the common good by encouraging student rebellion. By deciding the case on the basis of contract rights, the U.S. Supreme Court successfully sidestepped issues of duty, membership, and participation. However, other religious minorities would bring future legal challenges demanding clarification of the American conception of these remaining citizenship elements.

(ii) Duties:

American public fear of Catholicism in the nineteenth and early twentieth century was the catalyst for the next step in the extension of U.S. citizenship to religious minorities. This development reflected a **movement of normative emphasis from liberty rights in the direction of civic duty**. Feared more as an unpatriotic ideology than a heresy, Catholicism was popularly perceived as a religion requiring members to give unquestioning political allegiance to the Pope rather than the democratically elected U.S.

President. For this reason, the American public saw Catholics as ineligible for U.S. citizenship, which was premised upon the duty of loyalty to the representative democratic government. Conformity in the form of patriotic allegiance was seen as a necessary requirement for citizenship and the requisite element of a stable democracy. Attempting to retain and bequeath their unique religious and cultural identity to the next generation, America's immigrant Catholics established a parochial school system. Viewing these schools as unpatriotic resistance to assimilation and thus, anti-American, nativists supported the emerging public school system so that immigrant children would be formed by shared U.S. civic ideals.

However, private educators eventually called upon the U.S. Supreme Court to decide the constitutionality of Oregonian efforts to require attendance at public school and to forbid parents from choosing parochial education for their children. Demonstrating their embrace of U.S. Constitutional ideals, Catholic educators and parents (through their attorneys) asserted their First Amendment right to choose religious education for their children free from state interference. In the end, a unanimous Court supported the right of parents to choose private or parochial education for their children over public schools. In *Pierce v. Society of Sisters*, Chief Justice McReynolds penned the Court's opinion that:

> The fundamental theory of liberty upon which all governments in this Union repose *excludes any general power of the state to standardize its children* by forcing them to accept instruction from public teachers only. The child is not a mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the *high duty*, to recognize and prepare him for additional obligations.[844] [Emphasis added.]

While noting that private and parochial schools were non-profit corporations entitled to legal protection, the Supreme Court's decision upheld the parental right to choose

[844] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, at 535; 45 S. Ct. 571, at 573; 69 L. Ed. 1070; 1925 U.S. LEXIS 589; 39 A.L.R. 468 (1925).

parochial education for their children. Instrumental to their ruling was the confirmation that these religious schools met their legal and patriotic duty of educating students for American citizenship.[845] Through the *Pierce Decision*, the U.S. Supreme Court confirmed that Catholics were full citizens who were not only entitled to their constitutionally protected religious rights, but proven to have fulfilled their citizenship duties of patriotism and loyalty. Once again the lines of legally required tolerance were stretched open a bit further, resulting in a widening breadth of popular acceptance for religious minorities.

Through the *Pierce Decision*, the U.S. Supreme Court confirmed that American citizens of Catholic faith had met their patriotic duties and were entitled to full religious rights. Yet, issues of membership and participation continued to swirl in the background. While the high court affirmed their religious rights, many more years would pass before Catholics would enjoy unquestioned membership and full political participation in the American republic. As reflected by the parochial school funding disputes as well as the recriminations before W.W. I and W.W. II, Catholic membership continued to be challenged. The failed presidential campaign of Al Smith and recurrent Nativist repression stand as testament to persistent majority barriers to Catholic political participation.

(iii) Membership:

During the civil rights era of the late 1950's and early 1960's, American state statutory attempts to enforce conformity as citizenship were not only disrupted by demands for racial segregation. Religiously observant minorities also challenged local blue laws interfering with the commercial accommodations which they had forged to aid their own

[845] *Pierce v. Society of Sisters*., 268 U.S. at 534; 45 S. Ct. at 573.

Sabbatarian observances. So, the next step in the extension of U.S. citizenship to religious minorities, was a **transition from issues of duty to membership**.

Orthodox Jewish merchant practices challenged conformist notions of citizenship in an attempt to meet their religious communal duty in the face of state Sunday Closing Laws lacking religious exemptions. Such local statutes legally enforce a Sunday communal day of rest upon all citizens. The Sunday closing laws were passed with the legislative intent of benefiting the larger local community by requiring that all persons close for business on Sundays regardless of their religious beliefs.

Orthodox Jewish shopkeepers were forced by the religious laws of their faith community to close for Sabbath, from dusk on Friday evening to sundown on Saturday evening. Foregoing the income earned during these profitable shopping days, Orthodox Jews insisted on opening Sundays despite State Closing Laws. Failure to make blue law exceptions for religious belief adversely affected all Sabbatarians, so Orthodox Jews brought suit along with secular merchants to challenge the constitutionality of the laws. The states defended on the grounds that blue laws protected the public need for a common day of enforced rest, asserting a secular basis for a law formerly supported by religious bias.

In four similar cases decided in 1961, the U.S. Supreme Court upheld state blue laws despite the lack of religious exemptions. These plurality decisions were penned by Chief Justice Earl Warren and placed great emphasis upon the commonality of American citizenship and the secular basis for the blue laws. Even when confronted with the religious claims of Orthodox Jewish shop owners in *Braunfeld v. Brown*, Chief Justice Warren defended the overarching need for civic conformity over diverse requirements of

communal religious membership.[846] To dissenting Justices Douglas, Brennan, and Stewart's assertions that the religious duties of Sabbatarians were constitutionally protected,[847] Chief Justice Warren and the majority answered that secular conformity imposed only an "indirect burden" upon Orthodox Jews . Every citizen had to conform to blue laws, but retained the choice of religious observance and the resulting financial burden of closing on Fridays. The majority stressed that the Sunday closing laws were constitutional because they did not legislate against religious Sabbatarian practices, but only resulted in a financial burden upon nonconformists without regard for belief.[848]

Through its *Braunfeld Decision*, the U.S. Supreme Court sought to protect the shared aims and practices of civic membership. Underscoring the importance of a common day of rest, the majority observed that communal habit, not religion, was the basis for the Sunday holiday. State blue laws did not infringe upon the Jews' *halakhahic* duty, but only presented Orthodox with a personal dilemma of how to make-up lost revenues if they chose to close their businesses on Saturday.

As a result, Orthodox Jewish citizens in states with exemption-free blue laws continued to be legally forced to conform to Sunday business closing laws in addition to their *halakhahic* requirement that they close on the Jewish Sabbath and forego business profits on all civically and religiously proscribed days. This remained a high price for Jewish citizens in America. In time, the shopping practices of the majority undermined the blue laws, freeing Jews from their arguably unconstitutional, if indirect, financial

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[846] *Braunfeld v. Browns*, 366 U.S. 599, at 602-606; 81 S. Ct. 1144, at 1145-1147; 6 L. Ed. 2d 563 (1961).
[847] Justice Douglas's Dissent in *McGowan v. State of Maryland*, 363 U.S. at 564; 81 S. Ct. at 1219 (1961); Justice Brennan's Dissent in *Braunfeld v. Brown*, 366 U.S. 610, at 613, 615-616; 81 S. Ct. 1149, at 1150, 1152 (1961); Justice Stewart's Dissent in *Braunfeld v. Brown*, 366 U.S. 616, at 616; 81 S. Ct. 1152, at 1152 (1961).
[848] *Braunfeld v. Brown*, 366 U.S. 599, at 603, 605-606; 81 S. Ct. 1144, at 1146-47.

burden. Evolution of shopping practices, not the U.S. Supreme Court, ultimately freed Jews from the civic burden of Sunday conformity.

Yet the U.S. Supreme Court's failure to protect the rights of the Jewish Orthodox minority did impact the other elements of citizenship: namely, rights and participation. Although Jews retained the religious right to observe their own Sabbath, that right was complicated by the practical ramifications of state blue laws. Legislatively required Sunday business closings jeopardized the financial stability of Jewish shopkeepers who relied upon Sunday revenues to make-up for profits lost through strict Saturday Shabbat observance. Regarding participation, the *Braunfeld* decision left American Jews and other Sabbatarians with only three choices as to how to interact with American society. As detailed in Chapter 5, these religious minorities could secularize, privatize, or separate. Those Jews who secularized and assimilated gave up their Jewish communal identity in favor of a conforming American citizenship. Those who privatized their religion, publicly appeared to assimilate while privately retaining their Jewish ritual identity. Yet, this form of private religious expression conformed to American Protestant conceptions of citizenship as the overarching identity with religion confined to privatized belief and expression.

Many Orthodox Jews have chosen to retreat from society and into their own religious-ethnic enclaves so that they may adhere to their religiously-observant ways of life. The Supreme Court's *Braunfeld Decision* may have been one of many factors that encouraged the Orthodox Jews to retreat from U.S. society. At the very least, it could only serve to confirm Orthodox concerns about the profane condition of United States, to underscore the secular nature of American society, and to cause concern for the fragility of Jews'

religious liberty. After *Braunfeld*, many Orthodox Jews felt that they had to make a choice between their faithful observance of Judaism and their active membership in the larger U.S. society. Others became more politically involved in an effort to preserve their religious freedoms and group rights.[849] Such engagement in American politics itself creates appreciation for rights, develops citizenship virtues, enhances the common good, instills civic membership, and teaches participation skills.

(iv) Participation:

Currently, Islam confronts American claims of bestowing full participation upon all her citizens. A combination of religious ignorance and fear for national security obscures the publics' perception of Muslim citizens' desire for civic inclusion and attempts at political engagement. Recently, five Muslim Americans brought suit in the Federal District Court of Western New York. They contested their experience of discriminatory profiling and heightened security processing at the hands of U.S. Border Security based upon their return to the U.S. from a moderate Islamic religious conference in Toronto, Canada. Their efforts represent the **final step from full membership to active participation** in the uneven movement toward full minority religious citizenship in the U.S.

In deciding *Tabbaa v.Chertoff*, Federal District Judge William Skretny did acknowledge the Plaintiffs' inconvenience, but failed to find a violation of the Muslim American citizens' First Amendment Rights. Instead, he held that the U.S. Border Guard's measures were necessitated by compelling national security interests in preventing terrorist crossings at the border. Therefore, he found that the undisputed facts of record failed to demonstrate that the U.S. Border Guard had engaged in religious

[849] *See* Chapter 5.

targeting of these Muslim Americans.[850] For this reason, Judge Skretny granted Summary Judgment for the Government.[851]

Relying on American ideals and values, the Plaintiffs filed an appeal with Second Circuit of the U.S. Court of Appeals again asserting their constitutional rights. Upon review of Judge Skretny's ruling, the U.S. Second Circuit Court of Appeals affirmed his decision.[852] While the Second Circuit did acknowledge in *dicta* that the Tabbaa Appellants retained their First and Fourth Amendment liberty rights at the border, it found that their treatment at the hands of the U.S. Border Guards was appropriate under the patrol's legislative mandate and commiserate with their Homeland Security directive. Thus, the Second Circuit determined that the Government had not violated the Muslim American Appellants' rights under the First and Fourth Amendments of the U.S. Constitution nor under the RFRA and APA federal statutes.[853]

In deciding the *Tabbaa Case*, the U.S. Second Circuit emphasized the security needs of the national citizenry over the rights claims raised by the Muslim American minority. A stated concern for security, a key privilege of civic membership, won out over the active participation of a religious minority. Yet, this case also involved more that just a conflict over civic membership and minority participation. It also raised issues about duties and rights. The federal courts implicitly decided that Muslim Americans had a duty to undergo legitimate security checks that protected the safety of the U.S. majority. Further, the courts affirmed Muslim religious rights at the border even as they found that

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[850] *Tabbaa, et. al. v. Chertoff, et. al.*, 2005 U.S. Dist. LEXIS 38189 (U.S. Dist. Ct. for W.D.N.Y. 12/21/2005), at 32-33, 34, 40, 44-45, 47, 52-53.
[851] Ibid.
[852] *Tabbaa, et. al. v. Chertoff, et. al.* , 509 F. 3d 89, (U.S. 2d Cir. 2007).
[853] *Tabbaa, et. al. v. Chertoff, et. al.* , 509 F. 3d 89, (U.S. 2d Cir. 2007), at 107.

those rights had not been violated in light of U.S. border guards' legislative mandate to secure America's international borders.

The case demonstrates that in an age of terrorism, the federal courts are willing to give national membership precedence over the religious freedom of the Muslim American minority. Despite their active participation in civic education, U.S. Muslims still face questions by their fellow citizens concerning their duties of loyalty and patriotism. On a brighter note, the *Tabbaa Case* reveals the Muslim American embrace of U.S. constitutional norms and citizenship ideals. Failing to receive either acknowledgment or redress of their constitutional rights, Muslim Americans pursued the established avenues for legal redress. All the while, the litigants engaged in vigorous public education and civic activities designed both to teach their fellow Americans about the tenets of Islam and to demonstrate how current national security policy violated their constitutional rights.

In the face of an adverse federal district court ruling, these Muslim petitioners never lost faith in the American justice system. Rather, they appealed to federal circuit court. They obtained a decision which represented a significant victory for all American citizens, because it was the first federal court acknowledgement that all citizens retain their rights at the border. However, in weighing their situation, the court did not provide the Muslim litigants with the redress which they sought.

Through their active participation, Muslim Americans continue to lay claim to their freedoms of religion, speech, and assembly even as they model liberal democratic practices. Their level of political participation exceeds that of any other recent

immigration group.[854] Asserting their unique Islamic identity, they understandably have asserted their right to refuse assimilation and to resist coerced conformity. Yet, their civic engagement points to fulfillment of their civic duties and their genuine integration as members of the American citizenry. Muslims are at a critical stage in their negotiation of their religious and national identities.[855] Recent Muslim experience in America has been characterized by the tensions arising between their sense of Islamic community membership and the expectations of full participation as U.S. citizens. As history has demonstrated, the decisions made by the federal courts and their fellow citizens can assist or impede their participation in American society. In the process, U.S. citizenship norms will continue to unfold.

B. Citizenship Models

Analysis of the historical religious cases above has led to the development of an ethical model of citizenship. Close study reveals the unfolding of American citizenship norms over time through the legal challenges presented by ever diverse minority religious groups. This observation closely resembles the findings of such serious legal scholars as Ronald Dworkin, who interpreted developing U.S. Constitutional precedent as "an unfolding narrative."[856] Indeed, the citizenship model demonstrates that over time, the

[854] Ihsan Bagby, "Isolate, Insulate, Assimilate: Attitudes of Mosque Leaders toward America, *A Nation of Religion: The Politics of Pluralism in Multireligious America* (Chapel Hill, N.C.: University of North Carolina Press 2006), p. 32; Eck, *A New Religious America*, pp. 360-363. ; Haddad, *Not Quite American?*, p. 26, 37, 45.
[855] Bagby, "Isolate, Insulate, Assimilate," p. 37; Smith, *Islam in Americ*a, p. 179.
[856] Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press 1986), p. 225. *See* Brian Bix, *Jurisprudence: Theory and Context* (Durham, N.C.: Carolina Academic Press 2004), pp. 87-89. Note that in *Law's Empire*, Dworkin makes this statement about all legal claims. He then applies his "unfolding narrative" theory to Constitutional law in a recorded discussion with Bill Moyer. In that interview, Dworkin tells Moyers that the Founding fathers laid down constitutional principles which they then "assigned us the rather daunting task of living up to them from our conscience. Bill Moyers, 5th Episode in

focus of religious minority contestation and federal court resolution of citizenship issues has moved from the element of rights to duty to membership and finally, to participation. The minority choice to challenge the status quo and to demand full inclusion opened public debate on the meaning of each citizenship element. Ultimately, it also led to U.S. Supreme Court decisions establishing the American normative sense of each principle.

Viewing the unfolding model as citizens, we are reminded that our perceptions and actions within the context of space and time do matter. Our thoughts and deeds determine not only the direction of our own American democracy, but the course of human rights history. In broadening the civic norms of democratic citizenship toward inclusivity, we expand U.S. democracy and open ourselves to play a more positive role in human history. In falling away from these citizenship norms, we move toward more ascriptive models of citizenship that value conformity over liberty and stability over civic friendship. We thus cause U.S. democracy to contract and set ourselves up for negative interactions both within and beyond our boundaries. .

1) The Two-Dimensional Citizenship Square

For ease of illustration, initially the four dimensional citizenship model will be reduced to a two dimensional box whose sides represent the four basic elements of citizenship: **rights, duty**, **membership**, and **participation**. As explained in Chapter 2, the box is formed by the intersection of the four axes constituting the ideological

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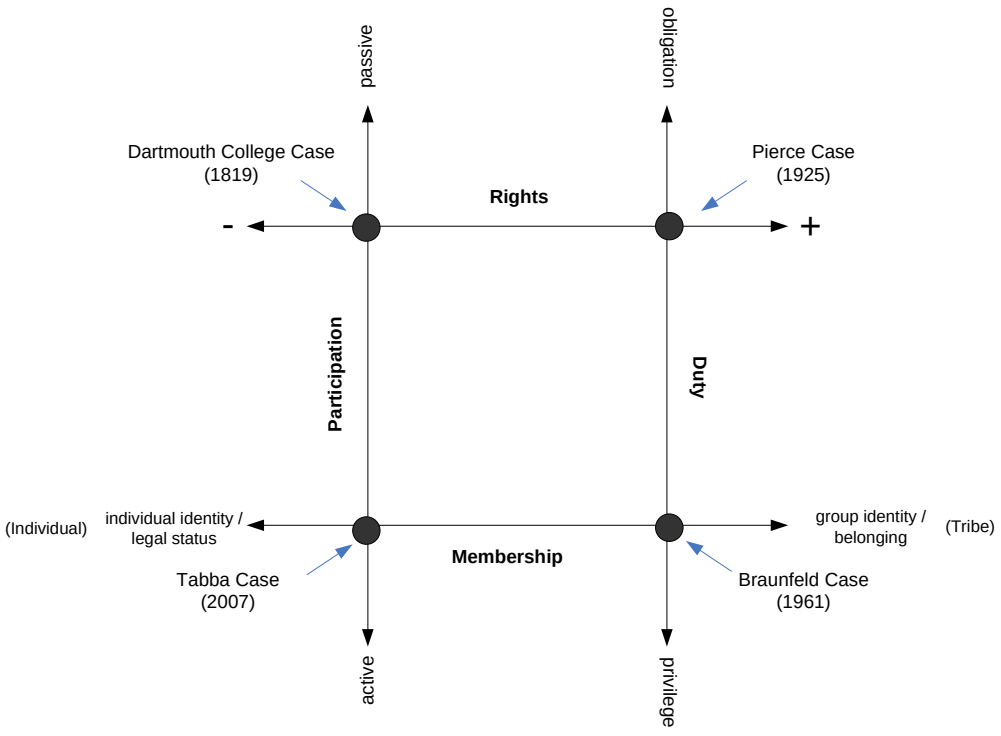
10-part TV Series," "Moyers: In Search of the Constitution," quoted by John Corry, "TV Reviews: The Constitution's Changing Story," NY Times (May 21, 1987) accessed at http://query.nytimes.com/gst/fullpage.html?res=9B0DE3D7123CF932A15756C0A961948260 on 4/13/08. According to Bill Bix's interpretation, Dworkin as indicating that "moral evaluation is integral to the description and understanding of law." Bill Bix, "Natural Law Theory," *A Companion to the Philosophy of Law and Legal Theory*, Dennis Patterson, ed. (Oxford: Blackwell Publishing, Ltd. 1999), pp. 223-240,237.

extremes of these formative citizenship elements. Each axis maps the path between the two extremes for each citizenship element**.** The first axis representing the citizenship rights element runs from negative to positive liberty, while the second axis associated with duty runs between the extremes of obligation and privilege. Membership forms the third axis with understandings ranging from group identity to individual status. Finally, the last axis constituting participation advances from passive to active engagement. Each of the axes intersects with two others in such a way as to form a two-dimensional square.

[Figure C-1]

Two Dimensional Citizenship Square



[Figure C-1]

Each corner of the two dimensional citizenship square represents the dominant American norm within its elemental range governing U.S. citizenship. The top left corner represents the citizenship element of **rights**. It sits on the ***negative*** side of the rights continuum axis representing the liberal understanding of citizenship rights articulated by Thomas Jefferson and explained by John Rawls. And, it is at the point of intersection between the rights axis and the passive side of the participation axis. This intersection explains the passive nature of the negative right to be left alone as well as the often negative democratic characterization of passive participation.

Next, the top right corner represents **duty** which crosses the rights axis on the positive side and at the point where duty is defined as ***obligation***. Representing the type of communally defined responsibilities identified by Michael Walzer, the American understanding of duty has roots deep within the civic republican tradition. As Alasdair MacIntyre describes, this tradition defines republican virtues and democratic practices that initiate one into the role of American citizen. Defining a communitarian sense of duty, the civic republican tradition establishes the sense of rights understood by T.H. Marshall as positive claims to welfare correspond to civic duty viewed as an obligation to the common good. Concurrently, it elicits a sense of membership inspiring citizens to willingly assume the obligations of their communal duty as a happy responsibility, rather than as the obligatory requirement mandated for belonging.

The bottom right corner may be labeled **membership.** It exists at the third axis where membership is understood as ***belonging.*** And, it meets the duty axis where civic duty is understood as a ***privilege***. This makes sense because Iris Marion Young and William Kymlicka's understanding of group identification is based upon the privilege of

belonging rather than performance of obligatory duties. The opposite side of the membership axis denotes individual status and personal identity. This side crosses the participation axis at the point of active engagement, where individual status translates into personal agency.

Finally, the bottom left corner constitutes **participation.** It stands at the point on the fourth axis where participation is understood as ***active engagement.*** It meets the third axis where membership is understood as individual status. And, this graphically illustrates Seyla Benhabib's assertion that the active engagement of autonomous individuals within a participationist discourse is an essential feature of liberal democratic citizenship. The opposite side of the participation axis crosses the rights plane at the point of negative rights. This phenomenon is explained by the American understanding of liberty rights as inalienable. Inherent to each citizen, such rights exist without the need to be advocated or defended through active participation.

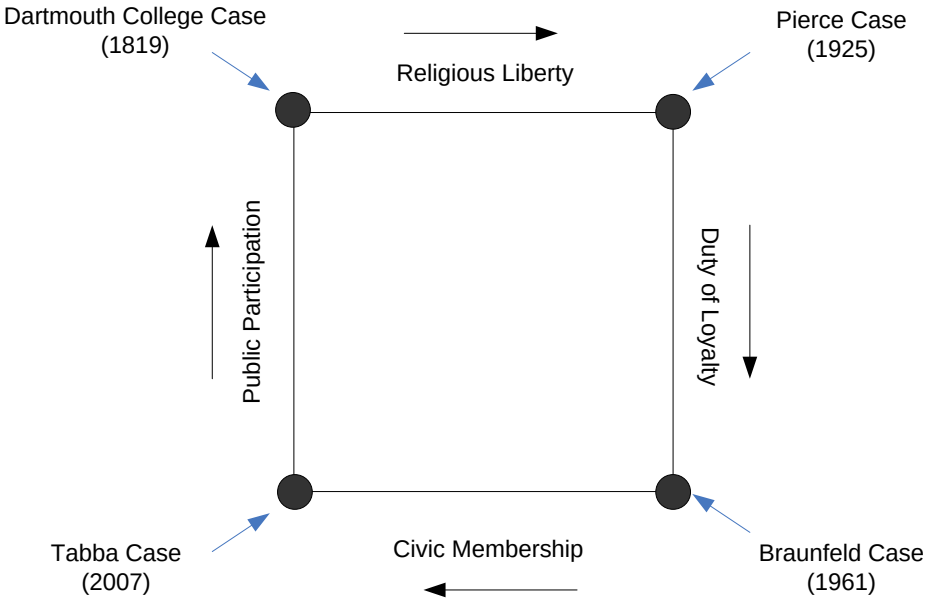
(a) Elemental Movement Around the Corners of the Citizenship Square

Moving clock-wise around the four corners, the square helps track the movement of citizenship elements through the U.S. Supreme Court's historic development of citizenship norms in the cited cases. In other words, the **interplay between religious minority membership and full citizenship throughout U.S. history** may be understood **as an uneven movement around the citizenship square diagram.**

In other words, the U.S. Supreme Court's development of citizenship norms may be understood as movement from the emphasis upon the negative rights of the Protestant minority in the *Dartmouth College Trustees Decision* to the affirmation of Catholic

parents' right to choose parochial education based upon the parochial school fulfillment of patriotic duty in the *Pierce Case*. Then, the high court considered American Orthodox Jewish membership issues in *Braunfeld* while the U.S. Court of Appeals, Second Circuit recently confronted national security fears in light of Muslim American participation in *Tabbaa v. Chertoff*.[857] Detailed application of the two dimensional model to these fulcrum religious citizenship cases follows. **[Figure C-2]**

Two Dimensional Citizenship Square with Case Movement Over Time



[Figure C-2]

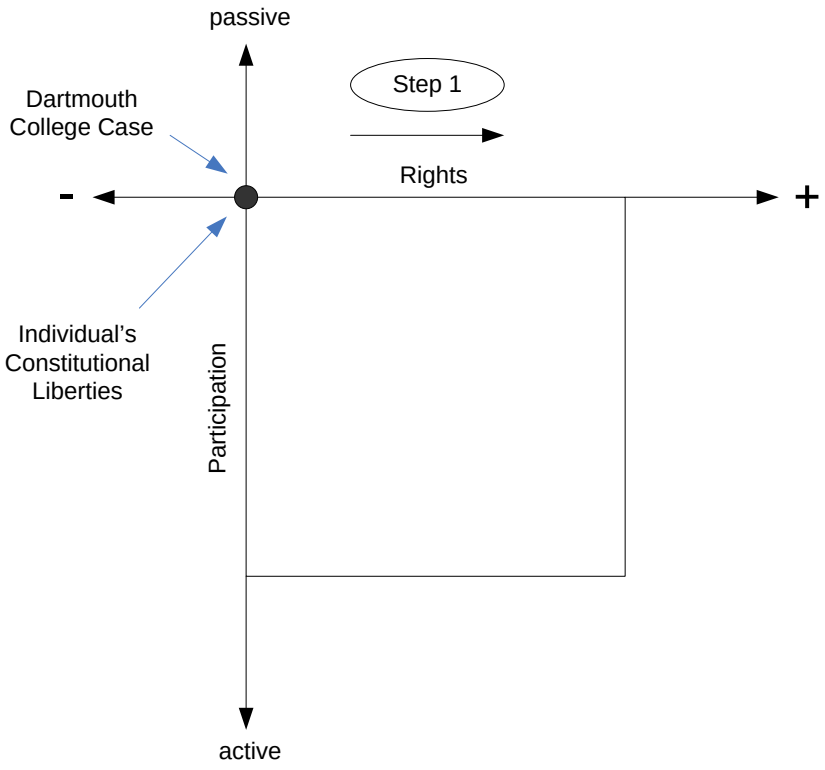
(i) Rights as the Initial Cutting Edge

As detailed in Chapter 3, the *Dartmouth College Trustees Case* originated out of a religious dispute over participation in the governance of this state-chartered college.

[857] *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007).

Restricted from ruling upon religious doctrine by the First Amendment, the U.S. Supreme Court elected to decide this early religion case on basis of rights acquired under the secular law of contract. For this reason, **rights**' intersection with participation may be viewed as the cutting edge during the American context of the **Second Awakening**. It would become the basis for the U.S. Supreme Court's determination of how tensions between competing Protestant religious factions would be legally resolved in the federal courts. **[Figure C-3]**

Rights as Normative Cutting Edge



[Figure C-3]

Called on to decide whether Dartmouth College would be governed by its original, if increasingly evangelical, Board of Trustees or a legislatively stacked liberal one, the U.S. Supreme Court navigated a religiously neutral path toward resolution. In a unanimous

decision, the Court enforced the terms of the original state charter for Dartmouth College. The contract rights upheld were negative in the liberal sense that they protected the original charter and its officers from undue interference by the New Hampshire State legislature, controlled by Jeffersonian Republicans bent on establishing secular education. Refusing to rule upon religious doctrine, the justices instead viewed the case through the purely secular lens of contract law.

As a result, the Supreme Court effectuated the separation of State from Church. The *Dartmouth Decision* determined that religious institutions, whether churches or colleges, would be treated as private entities subject to secular law. So long as they acquired private, nonprofit status through state charter, the rights of their officers and shareholders would be defended according to law irregardless of their religious leanings. The case secured the rights of all individual persons and legal entities, without reference to their religious affiliation. Each believer and every religion would be treated equally under U.S. law, regardless of heretical charges or orthodox demands.

In practical terms, the *Dartmouth Decision* removed religious disputes from the public sector. From that point on, it was certain that American courts would decide legal conflicts on the basis of secular law rather than religious doctrine. In so doing, the Supreme Court Justices secured the rights of all American citizens irregardless of their religious beliefs. Specifically, the right secured was the negative one to be left alone in personal matters of conscience. Their decision relegated the **doctrinal conflicts between Protestant groups** to the private realm of church and home. As a result, good citizenship became equated with the public acceptance of legal values and the private cultivation of

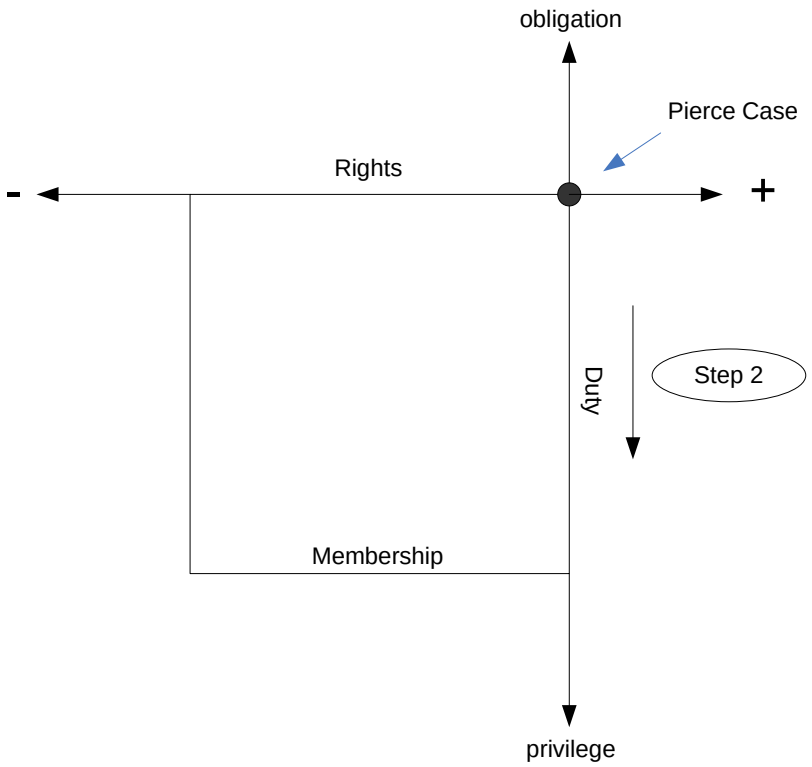
religious morals. Religious liberty was the citizenship norm established by the outcome of this U.S. Supreme Court case.

(ii) Duty as the Second Cutting Edge

Second, the *Pierce Case* arises from the tensions between civic **duty** and individual rights during the **age of mass European immigration**. As the disputed criteria, **duty** was to become the second cutting edge to define American citizenship. The *Pierce* lawsuit had its origins in the Oregonian public perception of **Catholicism as** more than a religion. Oregon's majority viewed Roman Catholicism as a **foreign ideology swearing loyalty to the Pope** rather than the U.S. President. Fomented by the KKK and Masonic prejudice, Oregonian voters believed that their legislation mandating public school attendance would counter Papal allegiance in the youth and assimilate all children to the civic duty of American allegiance. Parochial and private school parents protested that their individual right to direct their children's education had been violated. In choosing to file suit and pursue their rights in federal court, Catholic parents and schools demonstrated that they had assumed their duty and educated their children about American citizenship. They proved that the Oregon school authority itself had been satisfied that they had met this obligation and all other terms of their state charter.

[Figure C-4]

Duty as Normative Cutting Edge



[Figure C-4]

Although basing their ruling primarily upon the Catholic parental rights argument, the U.S. Supreme Court was careful to address the Oregonian concern about Catholic patriotism. In certain terms, Justice McReynolds's opinion confirmed that the Society of Sisters had met its civic duties under the Oregon corporate charter to provide secular as well as religious education. The Court noted that the record revealed no indication that parochial schools harbored teachers without "patriotic disposition," lacked "good citizenship" studies, or taught subjects "manifestly inimical to the public welfare."[858] Duty of political allegiance was clearly the Oregonian concern and the central issue of the *Pierce Case*. However, Justice McReynolds noted that assimilation through state

[858] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, at 534; 45 S. Ct. 571, at 573; 69 L. Ed. 1070; 1925 U.S. LEXIS 589; 39 A.L.R. 468 (1925).

enforced educational "standardization" was impermissible under the U.S. Constitution.[859] Instead, a unanimous Supreme Court decided the case on the American ideal of liberty – the right of every parent to educate their children as they saw fit. Again, the U.S. Supreme Court refused to examine religious doctrine or restrict religious expression. Instead, the Court defended parents' right to meet their duty in educating their children as they saw fit. Also, they affirmed the parochial schools' nonprofit corporate charter and private right to operate. The decision upheld the schools' negative right to be left free of public interference in private religious matters. The Court's rationale rewarded Catholic allegiance to the duties of secular citizenship education by affirming their liberty from arbitrary civic imposition of conformity.

The effect of the decision was to bolster Catholic confidence that Nativist discrimination would not be allowed to obstruct their First Amendment guarantees of religious freedom. The result was an outpouring of Catholic allegiance to American ideals and embrace of their civic duty as U.S. citizens. Not only would parochial schools become paradigms of citizenship education, but Catholic patriotic enthusiasm would be manifest in a heritage of Catholic institutions serving the nation's common good.

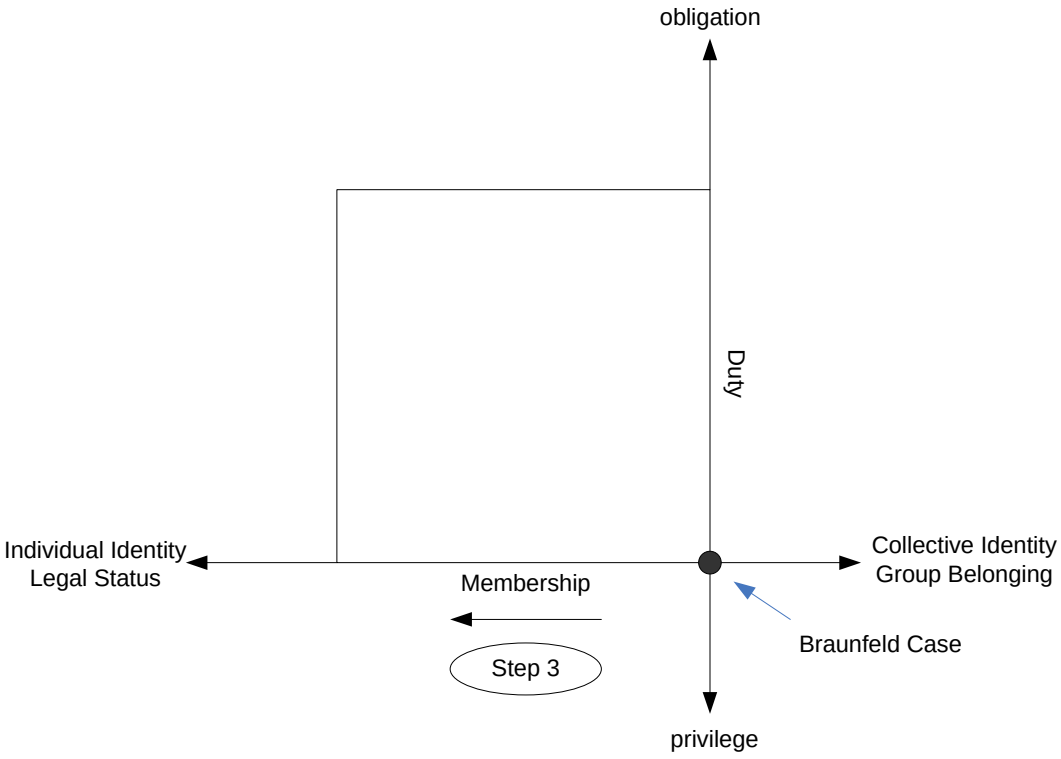
(iii) Membership as the Third Cutting Edge

Third, the *Braunfeld Case* results from the opposition between **membership** and civic duty. In the context of the civil rights era, this U.S. Supreme Court plurality decision written by Chief Justice Earl Warren favored majority enforced blue laws over Orthodox Jewish pleas for free religious exercise. Civic membership becomes the cutting edge

[859] *Pierce*, 510 U.S. at 535, 45 S. Ct. at 573.

given higher consideration than the religious duty to obey *halakhahic* commands to rest on the Sabbath. **[Figure C-5]**

Membership as Normative Cutting Edge



[Figure C-5]

In the wake of W.W. II, the American public embraced Will Herberg's articulation of American citizens as part of a national Protestant-Christian-Jewish mainstream.[860] Even so, majority coalitions of conservative Christian believers and small businesses banded together to pass Sunday closing laws. Their efforts were an attempt to combat commercialization and enforce Sunday worship. State criminal sanctions visited upon Sabbatarians had the unmistakable appearance of religious establishment and interference

[860] Will Herberg, *Protestant-Catholic-Jew: An Essay in American Religious Sociology* (Garden City, NJ: Doubleday 1955).

with free exercise. Over time, Sunday retailers of both religious and secular persuasions challenged the blue laws as veiled attempts to enforce conformity with Christian majoritarian beliefs.

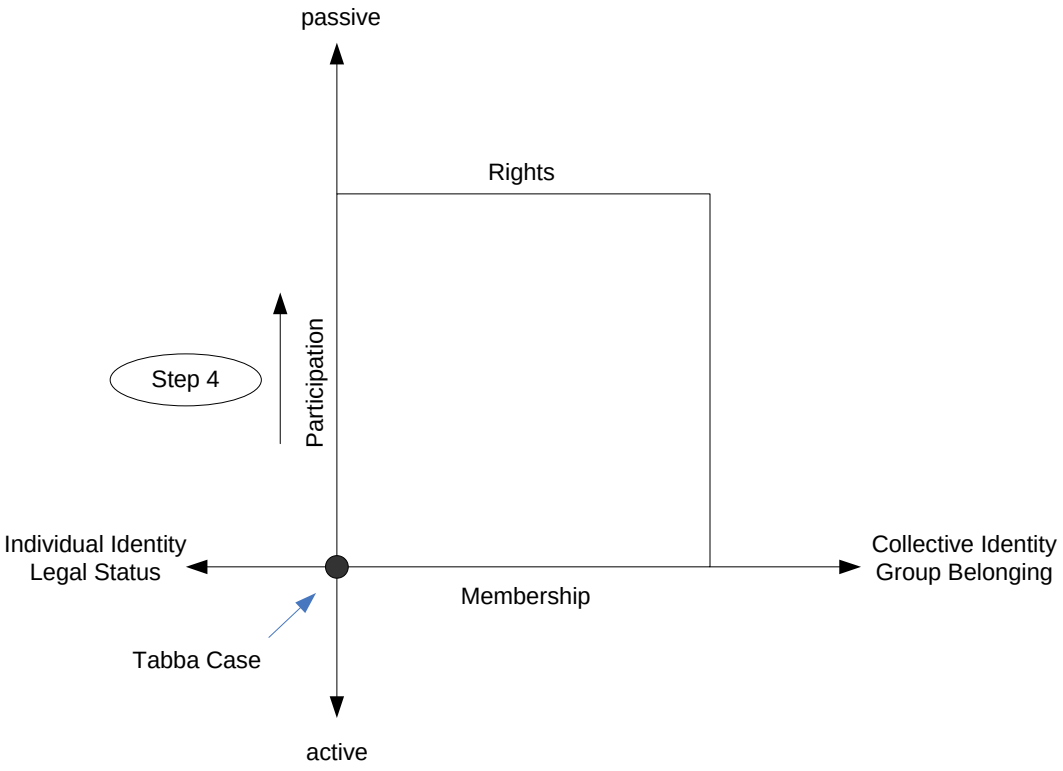
As one of four Sunday closing cases reaching the U.S. Supreme Court in 1961, *Braunfeld v. Brown* involved Orthodox Jewish merchants' appeal of their conviction under Pennsylvania's blue law. Jewish shopkeepers asserted that this act violated their First Amendment rights. As citizens, they claimed entitlement to equal protection of their federal liberties under the Fourteenth Amendment.

Membership in this case was defined by the U.S. Supreme Court as civic belonging as opposed to either religious group identity or autonomous individual status. Although no specific mention was made of competing membership norms, the case clearly involved a conflict between collective identities of religiously orthodox Jews and the secular civic community. In Orthodox Judaism, one must keep holy the traditional Saturday Shabbat and is free to work on all other days. However, the American civic community defined a communal day of rest which was adapted from the Christian majority's understandings of a Sunday Sabbath. While a statutory exception for religious Sabbatarians could have easily solved the problem, the U.S. Supreme Court remained reluctant to impose terms from the bench, leaving state legislatures free to make their own determination. In doing so, the Court created a valid question of whether and when majoritarian understandings should be allowed to determine and impose constituent norms of citizenship upon religious minorities.

(iv) Participation as the Current Cutting Edge

Finally, *Tabba v. Chertoff* involves the tension between citizenship expectations of full civic **participation** and the public fears surrounding religious membership. Post-September 11, federal courts have been called to rule upon a case brought by Muslim Americans constitutionally challenging Homeland Security policies at the border. The threat of terrorism and concern for national security provided a highly charged atmosphere in which to decide the First and Fourth Amendment rights claims of Muslim American citizens. Viewing themselves as full members of American society as well as faithful Muslims, these Americans demonstrated their belief in U.S. ideals through active engagement with the legal system, the media, and civic education. **[Figure C-6]**

Participation as Normative Cutting Edge



[Figure C-6]

Despite the argument that constitutional guarantees do not disappear at the border, Judge Skretny failed to find the U.S. Border patrol had violated constitutional or statutory rights. Instead, he insisted that national security policy was narrowly tailored to achieve its purposes. Despite their loss in federal circuit court, Dr. Tabbaa and her fellow petitioners remained civically engaged in publicizing their concerns and educating their fellow citizens about Islam. They voiced their belief in American values and their optimism that on appeal the federal court would vindicate their trust, securing their U.S. citizenship rights as well as providing redress.

Muslim participation both defines them as American citizens and educates their fellow citizens in the democratic process. Their efforts not only help to secure their own religious liberty, but to further widen U.S. citizenship norms. Even if the federal courts rule adversely, Muslim citizens' ongoing engagement in the political and legal processes may bring about the type of popular acceptance that proved the *Braunfeld Decision* irrelevant. Through their political activism, Muslim Americans attempt to push the U.S. citizenship norm beyond tolerance and acceptance toward inclusion and integration. Their legal challenges hold the promise of American citizenship norms which welcome religious difference and affirm cultural diversity as sources of social strength and spiritual wisdom.

(b) Interaction Between the Four Corners of Citizenship

Viewed in two dimensions, the Citizenship Square is made up of four axes representing the formative elements of citizenship: **rights**, **duty**, **membership**, and **participation**. Although each axis constitutes a normative continuum, the Citizenship

Square defines the range of elements that are acceptable within a specific liberal democracy. In the current diagram, each side represents the dominant American norm governing each elemental range of U.S. citizenship.

As the intersections between axes, each corner also represents the points of ongoing tension and potential conflict between two normative continuums. Although we deal here primarily with the norms defined by the corner intersections, the axes of values arguably interact throughout the process of developing and maintaining citizenship within any citizen-based polity**.**

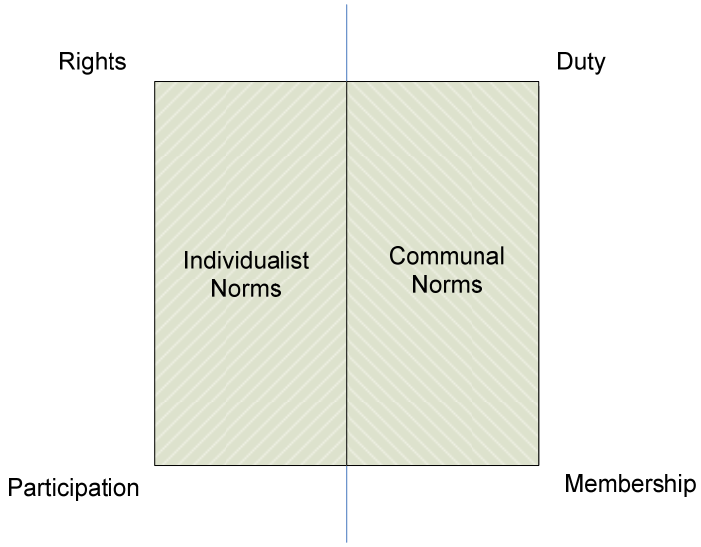
When the Citizenship Cube is reduced to a two-dimensional square, a **vertical line** may be drawn **down the middle, from top to bottom. [Figure C-7]** The values of rights and participation exist on the left side. Because American liberal understandings of these values focus on negative rights and self-determination, this half of the diagram may be understood to represent individualist interpretations of citizenship. In pursuing their claims, the Dartmouth Trustees asserted their charter rights to be free from government interference. The Muslim conference attendees claimed their individual religious liberties and guarantees against unreasonable government search-seizure as autonomous American citizens. They did not raise collective claims as a religious community.

Values of duty and membership appear to the right of the diagram. Emphasizing common good and collective identity, the right side of the graph denotes U.S. civic republican and communitarian understandings of citizenship. In the *Pierce* and *Braunfeld Cases*, the issue of American civic membership dominated the public contexts in which the U.S. Supreme Court was required to make these decisions. The Court's *Pierce Decision* justified the parental right to choose parochial education as a means of fulfilling

their collective duty to raise their children as contributing members of American society. Their *Braunfeld Ruling* emphasized the importance of a common state-delineated day of rest, absent any direct interference with Orthodox Jewish worship. The Court determined that any Orthodox business losses resulted not from the Blue Laws, but rather from the free choice of Sabbatarians to follow nonconforming practices.

The following graphic illustration is consistent with the popular U.S. categorization of political conservatives and liberals as "right" and "left," respectively. Conservatives are viewed as "the right" who reverence communal values (including religious dictates) and fear communal disorder more than the loss of personal rights. Liberals are viewed as "the left" who support individual freedoms and fear the loss of personal liberties more than chaos.

Citizenship Square Divided Vertically
Between Individualistic & Communalistic Norms

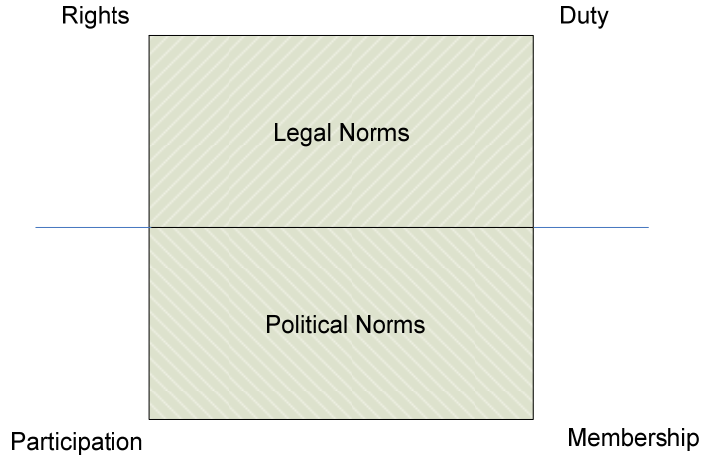


[Figure C-7]

A **horizontal line** may be drawn **through the center, from side to side** of the citizenship box. **[Figure C-8]** It then divides legal norms of right and duty at the top from the political values of participation and membership toward the bottom. The top

norms of right and duty emphasize legal concepts of liberty and obligation. So, the *Dartmouth College* and *Pierce Cases* were decided in favor of conforming religious minorities on the basis of legal rights to contract and to choose rather than religious establishment and free exercise. The norms of participation and membership represent the political foundation for governmental institutions that support and protect legal rights and duties. The *Braunfeld* and *Tabbaa Cases* resolved issues which the Court identified in terms of civic membership - finding the civic need for common rest and national security more urgent than the anti-establishment and free exercise claims asserted by nonconforming religious minorities. Without meaningful membership and active participation, citizens will be hard pressed to establish and sustain a form of liberal democracy which supports laws granting liberty and requiring accountability.

Citizenship Square Divided Horizontally Between Legal & Political Norms



[Figure C-8]

If the planes forming the citizenship square are **divided from the top left corner to the bottom right corner,** the resulting **vector** connects the two passive elements constitutive of American citizenship, the Liberal understanding of inalienable rights with

the Pluralist/Multiculturalist concepts of communal membership. **[Figure C-9]** Both are passive because Liberals understand rights as unearned and innate to every human being. Further, Liberals construe rights in the negative sense as the liberty to be left alone. Similarly, Pluralist/Multiculturalists understand membership in the sense of an inherent, collective identity.

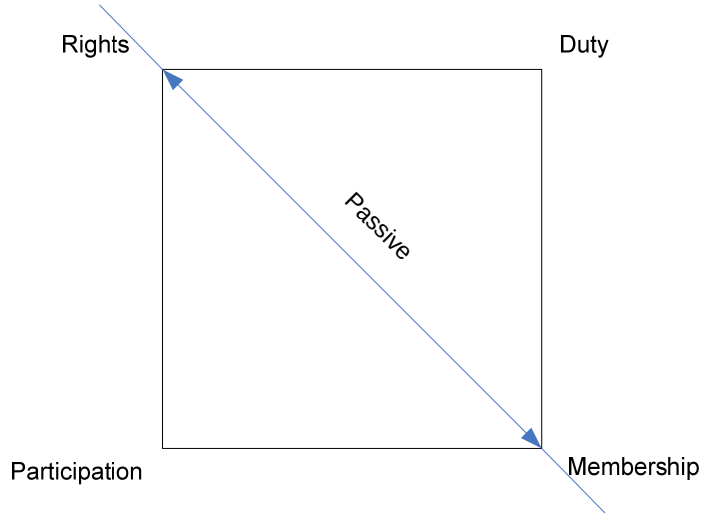
Under these theories, both rights and membership are viewed as inherent aspects of the citizen's identity, acquired by virtue of birth or blood and thus, nothing further is required from the citizen. The Liberal understanding of negative rights must be contrasted with the positive rights understanding of Communitarians, who stress there can be no freedom without the right to basic resources and services. Likewise, the Pluralism/Multiculturalist understanding of group identity must be contrasted with the Participatory/Deliberative model which asserts that identity must be understood not just within inherent membership, but also within the active participatory modes of the many individuals and groups that constitute a democratic constituency, something Charles Taylor refers to as "deep diversity."[861]

Both the *Dartmouth College* and *Braunfeld Cases* are illustrative of passive interpretations of U.S. citizenship norms. In *Dartmouth*, the college trustees successfully challenge the right to be free from state legislative infringement of their right to govern the college under state charter. Likewise, the Orthodox Jewish shopkeepers in *Braunfeld* challenge state blue laws as infringing upon their communal duty as Orthodox Jews. Divinely commanded by virtue of their religious identity, the Jewish shopkeepers assert that their adherence to orthodox religious norms must outweigh state legal mandates to

[861] Charles Taylor, "Shared Divergent Values," *Options for a New Canada*, R. Watts and D. Brown, eds. (Toronto, CN: University of Toronto Press 1991), p. 76.

passively conform to secular Sunday business practices and the broad civic definition regarding a common day of rest.

Citizenship Square Divided By Passive Norms Vector



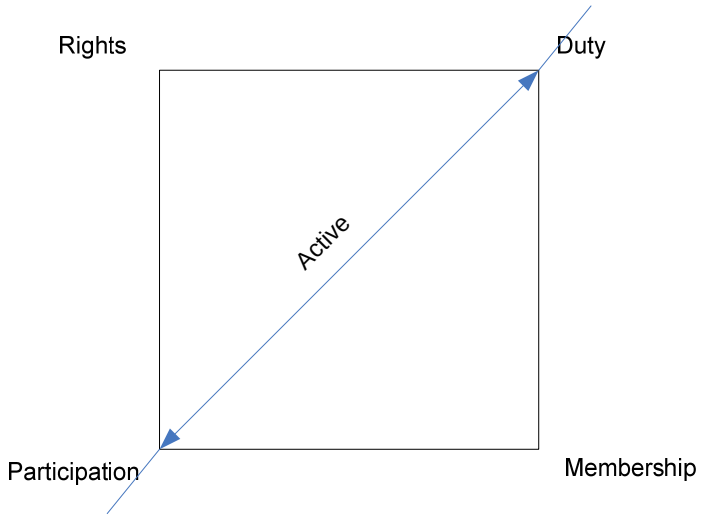
[Figure C-9]

Division of the square from the **bottom left corner to the top right corner** creates a **vector** connecting the active elements of citizenship, participation with duty. **[Figure C10]** As understood by Participatory/Deliberative Models, genuine liberal democracy requires the active participation of all its citizens within the public square. Benhabib defines citizenship as necessitating involvement in open and reciprocal dialogue as well as engaged participation in civic activities such as voting. Such emphasis upon active participation compliments the element of duty to which it is connected by this vector. Viewed by both Communitarians and Civic Republicans as essential, duty is the obligation which each citizen shares to work for the common good and/or conduct a virtuous life supportive of the social order. Walzer and MacIntyre agree that the citizen's

active fulfillment of his/her communal duty helps support and buttress society as well as universal human rights.

In the *Pierce* and *Tabbaa cases,* religious citizens demonstrated pro-active stances toward their U.S. citizenship. The Supreme Court upheld the rightful existence of parochial schools in large part because those private institutions had demonstrated the active fulfillment of their common civic duty to educate youngsters in patriotic citizenship and to prepare them for active participation in American society. Similarly, Tabbaa's Muslim American litigants have actively demonstrated patriotism and adherence to U.S. ideals through their public education efforts, as well as pursuit of their constitutional claims through officially designated channels of the executive branch of government and federal court system. Unfortunately, thus far, those same courts have viewed national security concerns as outweighing the claims which the *Tabbaa* Appellants have actively pursued.

Citizenship Square Divided By Active Norms Vector



[Figure C-10]

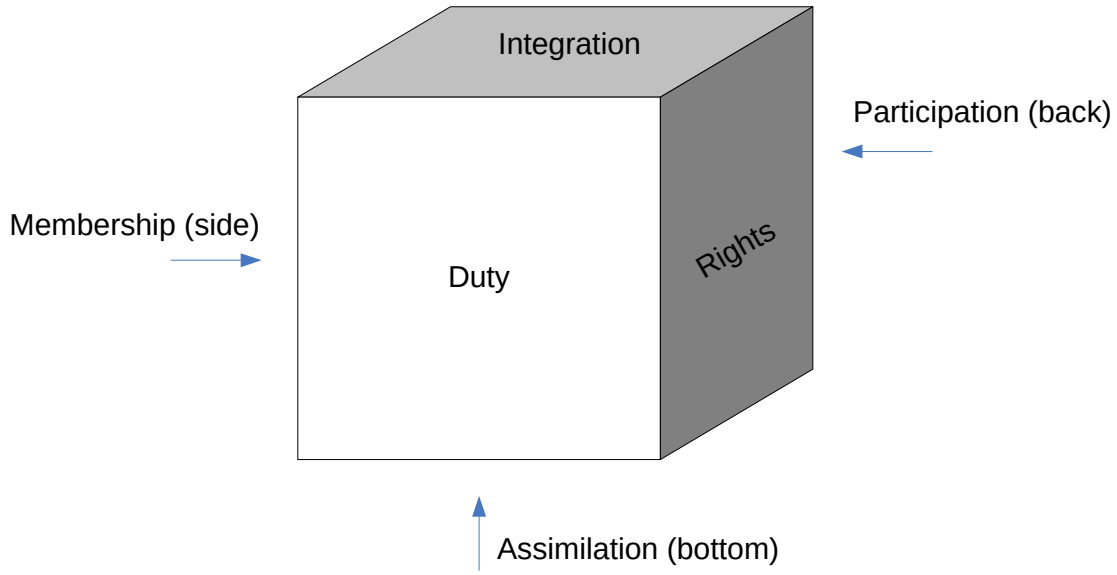
Understood in cross sections, divisions, and movements around the two-dimensional square diagram, the **citizenship box now resembles a grid.** As such, it now may be used to illustrate further insights into the attributes and patterns of citizen formation within a liberal democracy. The movement around the outside of the box represents the uneven pattern completing yet another plane descending toward assimilation/conformity or ascending toward inclusion/welcoming. Vectors of passive attributes or active engagement with citizenship values inform the behavior of citizens and government institutions alike, including the U.S. Supreme Court. Parallel vertical understandings of individual values and shared group norms may further guide the actions of citizens and government decision makers. Finally, recognition that certain elements of citizenship concern legal analysis or political synthesis may assist evaluation and aid progression toward a fully inclusive citizenship, welcoming of individual rights/identity and communal duties/membership. All such movement, analysis, and evaluation may be tangibly concretized only if accomplished within the fourth dimension of time.

2) Three Dimensional Models of Citizenship & Democracy

Returning to the three dimensional model, citizenship is depicted as a cube. Each of the four supporting sides defines portions of a continual plane stretching infinitely beyond the points of their intersection at the various corners of the cube. These side planes represent the familiar citizenship elements of rights, duty, membership, and participation. The top plane represents the ceiling of integration while the bottom plane represents the floor of assimilation. On all four sides, the normative planes of integration and assimilation are bounded by the four elemental planes of rights, duty, membership,

and participation. Intersections between the planes represent points of ongoing tension and potential conflict.

Citizenship Cube



[Figure C-11]

In quick review, the **citizenship cube**'s four supporting sides begin with **rights**, which extend from the classic liberal understanding of negative rights, such as autonomy, to the positive rights, defined by the social provision of basic human needs. Next, the intersecting **duty** side spans from definitions of obligation to privilege. From the duty plane, the third side is formed by **membership** extending from group belonging to individual legal status. Finally, the **participation** side runs from the membership plane at the point of active engagement to the rights plane at the point of passive demands.

[Figure C-11]

Each of the cube's sides is bounded on the bottom by the floor of **assimilation** and at the top by the ceiling of **integration**. As discussed in Chapter 2, assimilation represents

conformity to group norms and constitutes the original foundation of all citizenship. Arguably, some sense of sameness will always be necessary for national coherence. Yet, such conforming impulses must be balanced if democratic governance rather than a totalitarian regime is the goal. At the top of the citizenship diagram cube sits the plane of integration. This plane stretches continuously above the assimilation plane. Today, integration often is identified as the goal of citizenship. Yet, there may be an even less restrictive form of inclusion which completes and stabilizes the citizenship model. The goal remains to provide the best model possible for a legitimate, balanced, and stable liberal democratic citizenship.

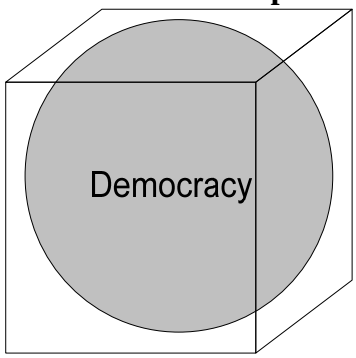
The sides of both the assimilation floor and integration ceiling are bounded on their four sides by the planes of the citizenship elements: rights, duties, membership, and participation. Its square cubical shape represents the legitimacy and political stability which the proper balance of the citizenship elements of rights, duties, membership, participation, assimilation, and integration bring to a liberal democratic polity. As such, it houses the optimal internal space within which democracy can exist.

Finally, **democracy** is represented by the **sphere** located within the citizenship cube. This is because true democratic process is spherical. It is relational, circulating freely among participants and equally between members. And, it is expansive enough to include all who wish to take part. [862] As a system of governance, it offers inclusive citizenship respectful of all persons, reciprocal in its sharing, and reflective of each contribution. An equal sided model, the citizenship cube expresses equilibrium between the foundational elements of rights, duty, membership, and participation. As such, it provides the

[862] Note that one must be legally defined as a citizen by society in order to be included/represented within the democracy sphere.

democracy sphere with optimal interior space for governance which nurtures justice and equality, legitimacy and stability, liberty and friendship. is just and fair. **[Figure C-12]**

Democracy Sphere
within the Citizenship Cube



[Figure C-12]

Applied to the four federal rulings explored in this dissertation, these interlocking, three dimensional models of citizenship and democracy help illustrate some important insights. First and foremost, they clarify the crucial role that the legal challenges brought by minority religions have played in the development of American citizenship norms. Second, the models indicate the cutting edge tensions that both have produced these challenges and have contributed to the U.S. Supreme Court's resolutions. Third, the models demonstrate the normative direction in which the Court's decisions and the public responses evoked have pushed the American understanding of citizenship over time.

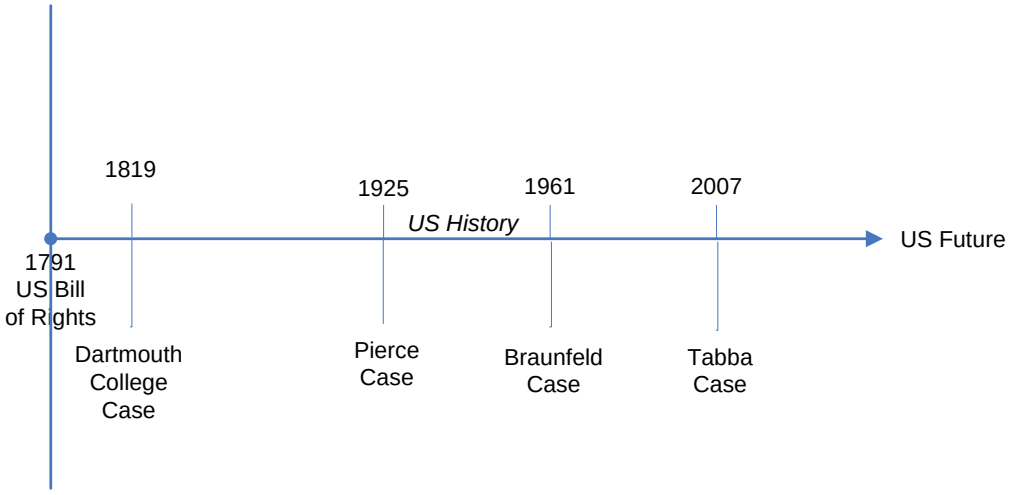
3) The Fourth Dimension of Time

The three-dimensional citizenship cube, housing the democracy sphere, rests within the fourth-dimension representing the continuum of time. The arrow of time extends from 1791, the year that the U.S. Constitution's Bill of Rights was ratified, to the right margin

of the page. As the fourth dimension, this **time line** provides the theoretical citizenship cube with grounding in reality and the opportunity for concrete, positive application.

[Figure C-13]

Model Representing
The Fourth Dimension of Time



[Figure C-13]

Through the historic review and theoretical analysis of religious minorities' legal challenges for full American citizenship, resulting U.S. Supreme Court's decisions, and popular response, a pattern emerges. American citizenship has tended to progress unevenly from assimilative norms of forced conformity toward ever broader inclusive values of tolerance, acceptance, and integration.[863] If this seems an overly optimistic

[863] Note that some legal scholars have identified a general movement in American society toward greater individual freedoms as defined under the U.S. Constitution. Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press 1986), p. 225. *See* Brian Bix, *Jurisprudence: Theory and Context* (Durham, N.C.: Carolina Academic Press 2004), pp. 87-89. *See also* Phillip E. Hammond, David W. Machacek, and Eric Michael Mazur, *Religion on Trial* (Walnut Creek, CA: AltaMira Press 2004), p. xvii. Martin Luther King, Jr. referred to this same unfolding of constitutional norms in his "I Have a Dream" speech. It was in that address that King famously asserted:

> "When the architects of our great republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness. … And so we've

picture, Rogers Smith reminds us that this movement is periodically marred by retreats to ascriptive prescriptions for civic membership even as it has been continually renewed by communal efforts toward ever wider inclusion.[864] Even the U.S. Supreme Court has made decisions that have inhibited rather than advanced the inclusive horizons of citizenship.[865] Future progress toward a more inclusive citizenship will require both judicial integrity in applying U.S. Constitutional principles and consistent actions of the citizen majority reflecting those principles in their daily behavior and interactions. **[Figure C-14]**

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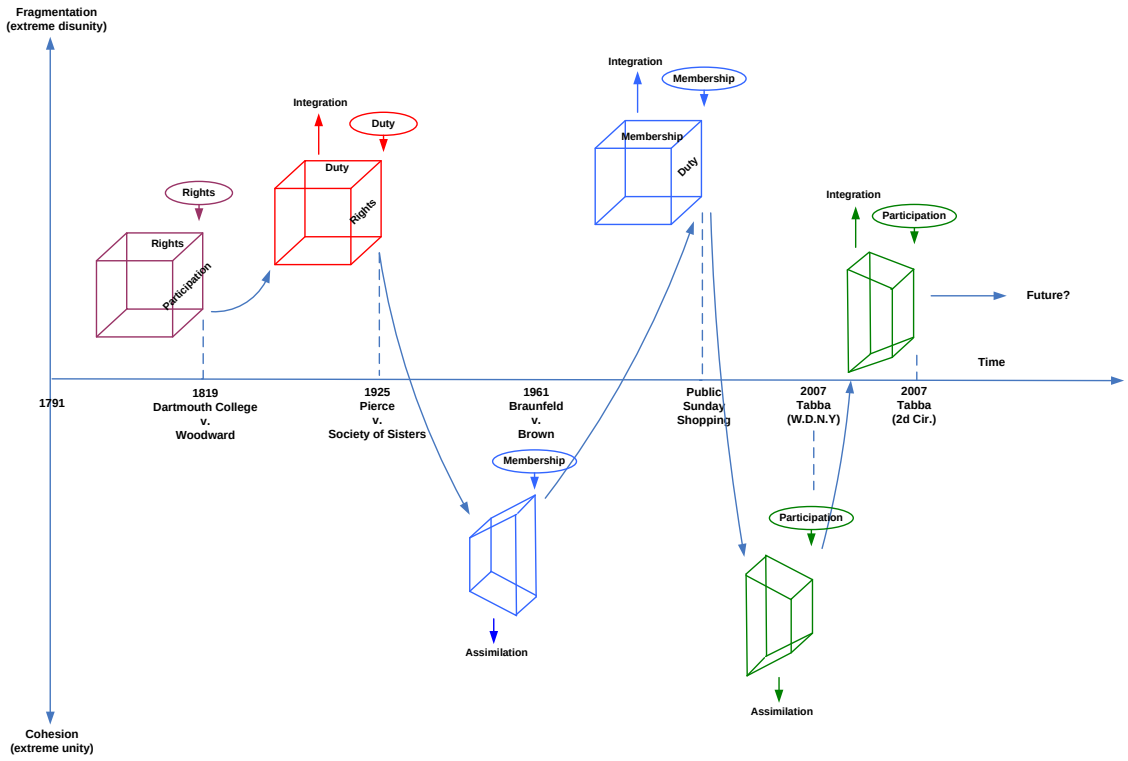
come to cash this check, a check that will give us upon demand the riches of freedom and security of justice."

King uttered these words in his keynote speech to the crowd gathered before Lincoln Memorial on August 28, 1963 during the Civil Rights March on Washington, D.C. Martin Luther King, Jr., *I Have A Dream* (New York: HarperSanFrancisco 1992), p. 102.

[864] Smith, *Civic Ideals*, p. 488.

[865] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857) *superseded by* CONST. amend. XV(1868).and overruled by *The Slaughter-House Cases*, 83 U.S. 36 (Wall.), 21 L. Ed. 394 (1873). In this case, the U.S. Supreme Court originally decided that a neither persons of African descent imported into the United States and held as slaves, nor their non-slave descendants could ever become U.S. citizens. After the Civil War, the *Dred Scott Case* was superceded by the Fifteenth Amendment to the U.S. Constitution. Thereafter, the U.S. Supreme Court directly overruled the in The *Slaughter-House Cases.*

Four Dimensional Model of Citizenship Cube Within Time



[Figure C-14]

4) Application of Citizenship Cube Within Time's Dimension

Application of the four dimensions model to the selected case histories helps provide comprehension and clarity about the development of American citizenship norms over time. It provides greater insight into the intersections and tensions between distinctive elements of American citizenship. At the same time, the model helps illumine the normative movements that have characterized U.S. law and policy regarding the citizenship of resident religious minorities.

Reflecting the ongoing development of citizenship norms, the Citizenship Cube does not remain static but moves through time. The Cube rotates outward along the time continuum. Its four supporting corners are created by the tensions between the citizenship

elements of rights, duty, membership, and participation. As it spirals, each supporting corner of the Citizenship Cube successively operates as **the cutting edge** of social change. Transformation is forged from the social dissension which originally fostered a key minority religious petition. Each resulting court decision is central to the national formation of American citizenship norms.

In deciding the legal issues raised by these complaints, the court also provides a resolution for public conflict over contrasting understandings of two fundamental citizenship elements. The first three legal complaints eventually resulted in a U.S. Supreme Court Decision operating as the fulcrum propelling the particular religion into or out of the mainstream. The fourth case invited U.S. Circuit Court resolution, introducing issues of Muslim American participation to the mainstream.

In its outward rotation through time, the Citizenship Cube has made uneven movements into the future. Historically, its cutting edge has progressed from the intersection of participation and rights in the *Dartmouth College Case* to the tension between rights and duty reflected in the *Pierce Case*. Subsequently, the elemental edge was the tension between duty and membership resolved in favor of national membership in the *Braunfeld Decision* and the conflict between membership and participation addressed in the *Tabba Case*.

The Citizenship Cube also moves in two additional directions. First, its trajectory through history may be viewed from the side as a spiral outward in either an upward or downward direction. As it twists out and up, the model reflects the American social movement toward fuller integration of minority religious citizens. When it twists out and down, it reflects the movement of U.S. society toward greater assimilation of minority

religious citizens. These directional changes also reflect the effect of the subject U.S. Supreme Court decisions and current U.S. Second Circuit Court ruling upon American citizenship norms as well as the extent of their influence upon popular acceptance of the particular religious minorities involved.

A second, concurrent directional change of the Citizenship Cube occurs as judicial rulings and their public reception either overemphasize or overlook one citizenship element in regard to the others. To reflect these developments, the side of the Citizenship Cube representing the exaggerated or diminished element either is lengthened or shortened in relation to the others. Once this occurs, the Citizenship Cube sides are no longer in balance and it becomes a misshapen prism. With the equilibrium between its supporting sides destroyed, less than optimal interior space exists to house the Democracy Sphere. **[See Appendix III – Additional Pedagogical Models]**

a) First Movement: The *Dartmouth College Trustees Decision* (1801)

The U.S. Supreme Court's *Dartmouth College Trustees Decision* is the first movement of American citizenship norms to be represented by the four dimensional citizenship model. Its Citizenship Cube representation sits to the right of the year 1789 because the decision was rendered in 1819, two decades after the ratification of the U.S. Bill of Rights. Resting at its intersection with participation issues, the **negative rights** corner of the cube represents the normative cutting edge of the *Dartmouth Decision*.

The *Dartmouth Case* cube sits above the U.S. Bill of Rights trajectory. This is because this U.S. Supreme Court ruling assured liberty to all Protestant citizens, despite any heresy charges which might be leveled upon minority religious beliefs. In so doing, the

Court's decision advanced the civic norm from promises of liberty to **protection from official interference** with diverse religious beliefs and raised citizenship ideals upward in a trajectory toward greater **integration** of minority citizens.

Again, this normative movement was accomplished by the U.S. Supreme Court's refusal to construe religious doctrine despite contrary pressures during the Second Awakening. Instead, the high court decided the Dartmouth College dispute on the basis of secular legal principles. Separation of church and state was accomplished through the application of contract principles and government protection of those rights for churches which officially applied for private, nonprofit corporate status. After the *Dartmouth Decision*, the citizenship cube continues to house the sphere of democratic governance. This is because the Court's ruling serves to **maintain the balance between** the **negative right** to religious noninterference, the **duty of tolerance**, **civic membership** regardless of private conscience, and **equal participation** of all citizens. Together, the elemental sides of the cube move American citizenship's conforming foundation of assimilation toward the ceiling goal of **integration**.[866] The Court's decision caused a normative shift which was effective in protecting individual rights but subtle enough not to compromise national unity.

b) Second Movement: *The Pierce Decision* (1925)

Next, the effect of the U.S. Supreme Court's *Pierce Decision* is depicted within the trajectory of U.S. history. Decided in 1925, the *Pierce* inspired model of citizenship rests

[866] Assimilation represents the floor/foundation of minimum unity that enables the U.S. to function without sinking further down into increasingly uncomfortably forms of cohesion. In contrast, integration represents the ceiling/goal of autonomy that enables individual liberties without rising too far above into increasingly uncomfortable forms of fragmentation**. [See Appendix III – Figure D-6, p. 377]**

to the right of the *Dartmouth Case*. As explained above, **duty**'s intersection with the rights element represents the next cutting edge which defined American citizenship during the period of mass foreign immigration. Despite Nativist attempts to enforce conformity through mandatory public schooling, the U.S. Supreme Court affirmed Catholic allegiance to America and upheld their right to educate their children in parochial schools. Their ruling encouraged Roman Catholic Americanization that was more akin to voluntary integration than submission to external coercive conformity. In so doing, the U.S. Supreme Court affirmed norms that pushed American citizenship outward toward greater tolerance of Catholics and upward toward further integration of religious minorities. Further, the Justices sent the signal that civic duty represented the obligation of each citizen to demonstrate allegiance to the national good before they could expect to share in privileges of civic membership.

As a result of the *Pierce Decision*, once again the citizenship cube rotated counter-clockwise outward to expose the cutting edge of **duty** as it spun upward raising the floor of assimilation further away from conformity and toward the ideal of **integration**. The model of American citizenship now rested even higher above the line representing the religious liberty values originally defined by the First Amendment in 1789. Once again, the ruling of the U.S. Supreme Court determined more inclusive values of citizenship. Their holding advanced citizenship norms from non-interference to **tolerance** of diverse religious beliefs. Citizenship ideals were placed on a trajectory away from enforced conformity and upward toward **greater U.S. integration** of a religiously diverse citizenry. Public schools continued to foster assimilative Americanization, but the *Pierce Decision* ensured the right of all parents to choose private, even Catholic schools to

educate their children. The result was the more inclusive American citizenship norm of toleration for diversity, both religious and ideological.

c) Third & Fourth Movements: *The Braunfeld Decision* (1961) & Public Aftermath

In 1961 *Braunfeld Case*, the U.S. Supreme Court decided to uphold the conviction of Orthodox Jewish shopkeepers under State blue laws. Their decision approved local legislation enforcing social conformity, rather than religious liberty. **Membership**'s intersection with duty comprises its cutting edge. The model of the 1961 *Braunfeld Ruling* rests to the right of the post-*Pierce* cube rendered 36 years before.

As a result of the Supreme Court's decision, the normative element of civic membership was emphasized at the expense of the other three citizenship essentials of rights, duty, and participation. As such, the *Braunfeld* citizenship model is imbalanced and so creates a misshapen, four dimensional prism rather than a cube. Further, this shape offers a smaller than optimal space for democratic governance. Thus, the democracy sphere housed within the citizenship model after the *Braunfeld Case* would be smaller than those existing after either the *Dartmouth College Trustees Decision* or the *Pierce Ruling*.

The Warren Majority's decision was insensitive to the commercial concerns of Orthodox Jews and arguably, **intolerant** of their religious liberties. Financial sacrifice and inconvenience were determined to be a fair price paid by religious nonconformists for membership in their civic community. As a result, the citizenship cube now rests below the U.S. Bill of Rights trajectory. Because of the U.S. Supreme Court allowed enforced conformity, the first *Braunfeld* model is shown to propel its elongated civic

membership edge into the trajectory of history falling downward toward further **assimilation** and away from the American goal of further integration.

Fortunately, the U.S. Supreme Court did not make the final decision regarding State Sunday Closing Laws. While the *Braunfeld Decision* continues as precedent and blue laws remain on the books, the American public subsequently undermined the blue laws by continuing to shop on Sundays. Thus, the *Braunfeld Decision* results to a quadrant of political norms determined by the public majority rather than legal norms decided by the judiciary. For this reason, a second Braunfeld model later appears as a restored Citizenship Cube above the public's continued Sunday shopping in contravention of the Supreme Court sanctioned state blue laws. With its elements returned to equilibrium, the Citizenship Cube again offer ample space for democracy.

d) Fifth & Sixth Movement: *The Tabbaa Decisions* (2007 & 2008)

Depicted on the four dimensional citizenship model, the District Court decision in the *Tabbaa Case* first appears on the time line at its point of rendition in 2007. As in *Braunfeld*, the District Court's decision fails to further the rights of the subject religious minority. So, its impact is reflected by a citizenship model resting below the U.S. Bill of Rights trajectory.

Active **participation** constitutes the cutting elemental edge of the model at the point where it intersects with individual legal status. This illustrates the active engagement of Dr. Tabbaa and the petitioners in asserting both their legal standing before the court as well as their active assertion of their constitutional and statutory rights as U.S. citizens.

To date, the federal courts have failed to vindicate the plantiffs' claims for redress of rights, duty, or full membership. Both the District Court and U.S. Circuit Court decisions in *Tabbaa* weighted the U.S.'s common national security interests above the religious liberty claims brought by the Muslim American petitioners. Thus, both *Tabbaa Decision* models depict the side of participation as diminished at the expense of the other three elements of citizenship. Like the model following the *Braunfeld Decision*, these new citizenship models are no longer proportional cubes. Instead, they have become misshapen prisms which fail to offer the optimal space for democratic governance.

So far, national security concerns appear to have figured more prominently in federal court deliberations than the claimed violations of the *Tabbaa* petitioners' religious liberty. Most troubling, Federal District Judge Skretny's grant of Summary Judgment for the Government as a matter of law, even when all pleadings and evidence of record were viewed most favorably toward Tabbaa. While his decision may have propelled the citizenship model on its continued spiral outward on the time line, it has caused a normative fall below the "indirect" if adverse economic impact of the civic conformity enforced by the *Braunfeld Decision*. In the name of national security, the U.S. District Court holding in *Tabbaa* summarily allowed U.S. border guards to continue policies targeting Muslim American citizens for heightened scrutiny. The U.S. District Court ruling in *Tabbaa* pushed the citizenship model on a downward trajectory toward assimilation and away from integration.

Although the Circuit Court affirmed the District Court's decision, it did express in *dicta* that the Tabbaa Appellants possessed constitutional rights at the border. This judicial acknowledgment represented an advance in citizenship rights. For this reason, the

citizenship prism subsequently rises outward and slightly upward above the Bill of Rights line. While this movement returned the citizenship model toward integration, it failed to rectify or redress Muslim American claims. For this reason, citizenship currently remains a misshapen prism that for the time being, fails to house robust democracy.

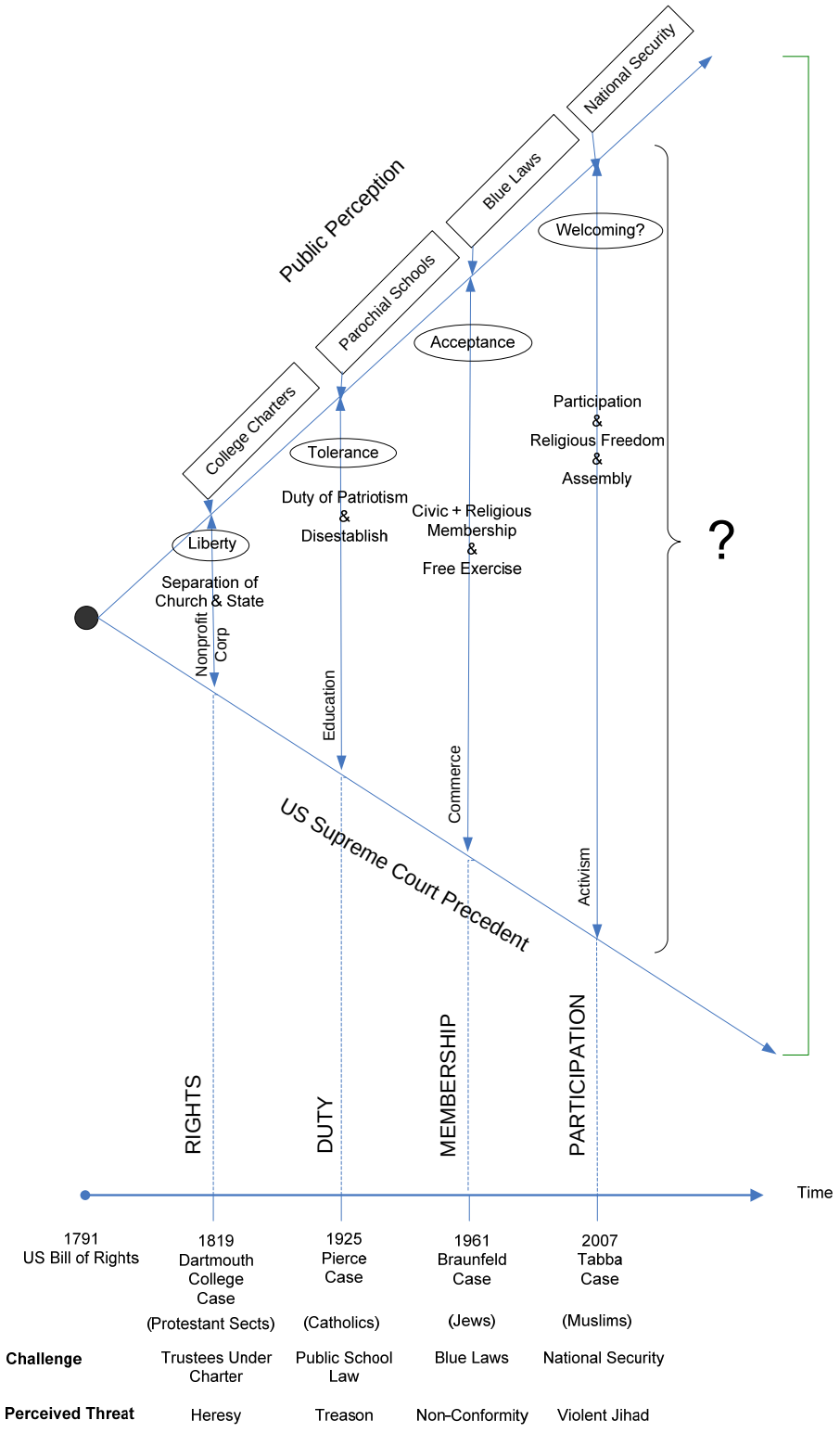
However, increasing publicity of the *Tabbaa Case* outcome does seem to have raised public consciousness about the need for greater **civic friendship** toward Muslim American citizens. It remains to be seen whether Muslim American participation will widen American citizenship norms toward **further integration** of the Muslim religious minorities into the American mainstream.

5) U.S. Citizenship's Normative Movement

Finally, one last two-dimensional model helps to illustrate the overarching pattern of American citizenship norms as historically responsive to the ongoing challenges of distinct minority religious groups. This diagram represents an angle with the closed end facing the left margin of the page and the open end facing the right margin. The **top line of the angle** represents the upward and outward direction of public perception regarding religious minorities. In contrast, the **bottom line of the angle** represents the outward and downward trajectory of U.S. Supreme Court precedent concerning inclusion of minority religious groups. Despite this receding line of legal cases, the **interior of the angle** continues to broaden as minority religious members experience ever greater levels of inclusion and acceptance. **[Figure C-15]** Over time, distinct religious groups have presented increasing challenges to American citizenship norms at the same time that the

issues which they raise progressed around the four corner axes of the two-dimensional citizenship box.

Two-Dimensional Model of
The Movement Citizenship Norms Over Time



[Figure C-15]

Starting with evangelical Protestants, the controversy surrounding the ***Dartmouth College Case*** challenged the religious liberties secured by the First Amendment. As the Supreme Court struggled to decide the liberal secular challenge to the duly appointed religiously conservative trustees, the American public grasped the need for due tolerance of religious differences and just enforcement of contracts including the charters of private colleges. Justice Marshall's opinion penned on behalf of a unanimous U.S. Supreme Court forcefully separated issues of religious doctrine from legal affairs. In so doing, they provided minority Protestant groups with the negative right to be left alone from government interference, introducing a public definition of religious tolerance and broadening the norms of U.S. citizenship. Further, the *Dartmouth Case* precedent allowed the U.S. Supreme Court and other governmental institutions to sidestep First Amendment interpretation over religious conflicts for almost one hundred and fifty years. Thereby, the U.S. Supreme Court attempted to maintain a stance of **neutrality** toward religion.

Just over one hundred years later, the ***Pierce Case*** would pit Oregonians' desire to create assimilative conformity and enforce patriotic duty against Catholic demands for religious liberty and academic choice. While again avoiding interpretation of the First Amendment's religious clauses, the U.S. Supreme Court nevertheless supported the parental right to choose religious education for their children. American Catholics experienced the Supreme Court's decision as a vindication of their patriotism and acknowledgment of their full social standing. The model depicts these developments as the increased widening of the angle formed by the vectors of public support and legal precedent. This broadening angle illustrates Catholic immigrant experience of official

recognition and Constitutional protection, resulting in increased public **tolerance** of their religious faith.

Almost forty years later, State Sunday closing laws enforced a common day of rest – some without exemption for Sabbatarian business persons. In the Braunfeld Case, Orthodox Jewish shopkeepers challenged the Christian establishment of the blue laws as well as government interference with their free exercise of religion. Conflict between religious and civic membership became the issue which pried the lines of public perception and legal precedent farther apart. Despite U.S. Supreme Court rejection of Orthodox Jewish merchants' religious liberty argument, the American people craved the commercial convenience of shopping on Sunday more than a state-imposed common day of rest. The result was public rejection of blue laws and the further opening of citizenship norms to include **acceptance** of Orthodox Jewish businessmen and their commercial practices.

Today, Muslim American legal challenges promise to further widen U.S. citizenship values. Actively contesting religious profiling and discriminatory treatment in the name of national security, U.S. Muslims are demanding their Constitutional rights to liberty of conscience and equal treatment. Although the courts have so far affirmed that the U.S. government has not exceeded its authority or violated constitutional rights, federal acknowledgment that citizens possess religious guarantees at the border further broadens our notion of citizenship. Muslim activism and the resulting publicity does seem to have raised public consciousness and inspired greater acceptance of Islamic American citizens.

It remains to be seen whether Muslim American litigation will again widen American citizenship norms toward **welcoming** the insights and gifts offered by religious minorities

such as Muslims. The Second Circuit decision in *Tabbaa* strengthens the future eventuality of such an outcome. While a conservative Supreme Court may not reach a similar decision, the *Tabbaa Case* demonstrates that America's federal courts continue to interpret the Constitution in a manner that protects the rights of religiously diverse minorities. Further, the case has heightened public awareness about religious profiling. It has also fostered popular empathy for Muslim Americans whose religious rights are violated by government officials in the name of national security.

In conclusion, this two-dimensional representation illustrates the overall trend toward the widening of American citizenship norms. **[Figure C-15]** Sometimes these advances have been the result of judicial decision and at other times, they were the consequence of adverse public reaction to such rulings. These opportunities for change were created by the periodic challenges of religious minorities which leverage increasing space for religious minority freedoms between the line of public perceptions and U.S. legal precedents. In so doing, they have benefited American society and opened the possibility for the widening of constitutional liberties and broadening citizenship norms.

The parameters of religious tolerance may be wider than ever before – but the case of American Muslims proves that **such progress is not inevitable and further advances need to be made**. The *Tabbaa Case* illustrates that the United States still has much more room to grow toward total inclusion and full appreciation of minority religious groups and individuals. Hopefully, Muslim American challenges will pave the way for ever growing levels of welcome for religiously diverse citizens and strengthening U.S. allegiance to American citizenship norms among religious minorities.

C. Reflections Upon the Resulting Expansion of American Citizenship Norms

Religion has the capacity to ease American discomfort with difference. In so doing, it has aided the expansion of U.S. citizenship norms throughout history. This observation is bolstered by the historic normative contributions of the cited minority religious challenges to the positive growth of U.S. citizenship values from religious liberty to tolerance to acceptance.

The First and Second Awakenings not only increased America's numbers of dissenting Christian minorities through its tent revivals. It also fomented personal piety and undermined established religious authority in ways that ultimately supported the ideals of Jefferson and Madison and the religious liberties ratified in the 1789 Constitutional Bill of Rights. These legal structures provided the background for the Marshall Court's *Dartmouth Decision* which assured federal religious disestablishment and free exercise by permanently separating church from the state and privatizing matters of faith. Although representing diverse religious faiths, Protestant groups enjoyed increasing liberty to practice their faith free from government interference. Such freedom allowed diverse Protestant communities to join together and operate as the American religious majority. Although initially reserved for Protestant groups, **religious liberty** became firmly ensconced as a primary norm of U.S. citizenship.

Likewise, Nativist reaction to mass European Catholic immigration was softened by the tradition of charity and public service contributed by Catholic institutions. Over time appreciation and acceptance provided a groundswell of national support for the U.S. Supreme Court's *Pierce Decision* overturning Oregon's mandatory public school law and affirming parental choice of parochial school education. **Tolerance of diverse ideas and**

beliefs became an American citizenship norm that no longer only applied to different forms of Protestantism.

Post-W.W. II blue laws were conceived as measures to combat commercialization and support Christian values. Yet, the resulting crush for conformity harmed the economic livelihood of Orthodox Jewish and Sabbatarians. Once again, minority religious challenges helped to pave the way for eventual public acceptance of difference. In the *Braunfeld Case*, the U.S. Supreme Court refused to acknowledge the blue laws' Christian establishment or the very real impact upon the religious liberty of Orthodox Jews and Sabbatarian. Yet, the American public appreciated the Sunday retail opportunities which they provided. Over time, social contact and familiarity with Orthodox Jews and other Sabbatarians reduced anxiety. And arguably, public admiration for their religious piety and moral values assured their acceptance as fellow American citizens. As a result of Jewish Orthodox challenges to the ascriptive conformity enforced by American blue laws, **acceptance of ethnicity** became a civic norm of U.S. citizenship.

Currently, American Muslims are engaged in the struggle for full political participation. After September 11, their plight became further complicated by mounting questions concerning political ideology and loyalty. In their case, the challenge is not only their religious beliefs but their racial and ethnic identities, which are generally not European. Through their suit against Homeland Security's religious profiling policies, the Islamic petitioners in the *Tabbaa Case* continued the history of minority religious challenge to widen U.S. citizenship norms. Despite the adverse ruling of the U.S. District Court and lack of remedy from the U.S. Second Circuit, Tabbaa and her fellows remain active participants in American civil society. It remains to be seen if such participation

and an increasing visibility of their ongoing faithful practices, including works of charity, will be enough to assure that American norms of religious liberty, tolerance, and acceptance are shown to them. Can American Muslims widen U.S. citizenship norms to include **welcoming of racial difference as well as greater religious diversity?**

D. The Current Picture of American Citizenship

As U.S. history demonstrates, the current normative standards of American citizenship are a hard won achievement. Squarely based upon elements of rights, duty, membership, and participation, the inclusivity of these ideals has evolved slowly and with controversy. While history reveals blemishes upon American attempts to live out its founding citizenship ideals, time has reflected a progression of American norms from religious liberty to tolerance followed by acceptance and inclusion of minorities.[867]

Born from Jefferson and Madison's vision of freedom of conscience and ratified by popular majority, the Constitution's First Amendment guarantees liberty from government religious establishment and freedom of religious exercise. These religious freedoms became a normative foundation for American citizenship values. The First Amendment created the principled trajectory toward acceptance of persons holding diverse beliefs and hailing from different backgrounds into full legal, civic, social, and

[867] Historian Rogers Smith suggests that Americans value their civic identity not as ascriptive myth of national superiority, but as a hard-won democratizing achievement. Further, he believes that citizens must take responsibility for the continuation of that history, embracing the institutions of liberal democracy and the principles upon which they were founded. Smith also warns that the recent resurgence of American ascriptive and inegalitarian ideologies in the 1990's may compromise the liberalizing and democratizing policies of the late 1950's to the early 1970's which expanded minority opportunities for minorities. According to Smith, modern theorists' turn toward multiculturalism has not circumvented the rise of racial tensions and anti-immigration sentiments. Instead, it may have left ample intellectual and political space for those who wished to attack earlier democratic reforms. Rogers Smith, *Civic Ideals* (New Haven, CN: Yale University Press 1997), pp. 496-497, 476, 487-488.

political membership. Concurrently, it encouraged all persons to strive for active participation in a democratic, representative government of the people.

These American ideals have been secured by U.S. Supreme Court cases which established separation of church from state and affirmed the right to a religious education. Although the high court's movement toward the religious integration of all citizens has moved slowly since the Civil Rights Era and the Immigration and Nationality Act Amendments of 1965, the American public has continued to push popular citizenship norms toward growing acceptance of greater religious, cultural, and ethnic diversity. Today, Muslim citizens present their fellow Americans with the latest challenge to widen their attitudes and adopt a welcoming approach toward increasingly diverse minorities. As a group, Muslim Americans hold not only varying religious theologies but also differing viewpoints, ethnic origins, and races.

In the wake of Presidential Administration fear-mongering, current Homeland Security policies appear to be pushing for religious profiling and targeted searches of Muslim Americans in the name of national security. The good news is that some American citizens are pushing back. Muslim Americans have asserted their membership in the American nation and pressed for full participation in governance.

In *Plurality & Christian Ethics,* Ian S. Markham argues that America offers the world the significant cultural discovery of a tolerance both accommodating faith and the benefits of religious commitment.[868] He contrasts Great Britain's problems with tolerance

[868] Ian S. Markham, *Plurality & Christian Ethics* (Cambridge: Cambridge University Press 1996), pp. 25, 129, 194-195. Note that Markham's position fails to note the Islamic position that God created human diversity so that they may know one another, do good works, and together worship God. Qu'ran 49:13, 2:62, and 21:92; Surah 5, Verse 48. Such Qu'ranic verses have been the basis for Muslim tolerance of pluralism from the reign of Caliph Sayyid ʿUmar ibn al-Khattab to the Ottoman Empire.

to the United States' brand of pluralism.[869] Markham could make the same contrast between France, Germany, or Holland and the U.S.

For example, Moises Naim's 2005 comparative analysis of Arab Muslims living in Europe and the United States found that European Muslims in Europe were poorer, less educated, and in worse health than the average population, Muslims in the U.S. earned more money and were better educated than average Americans. In Netherlands, the ethnic Moroccan unemployment rate is 22% while in Britain, Muslims hold the highest unemployment rate of all religious groups in Britain. Yet, 42% of Arab Americans work as managers and professionals compared to 34% of the overall American population. [870]

Lacking the United States' extensive history of immigration, European nations believed that immigrant guest workers would return home. So, these countries did little to invite the foreign born into their culture or educate them about their history. Instead, they tended to leave them to their privacy and strand them in their cultural ghettos. Stressing multiculturalism, the Europeans largely abandoned efforts to encourage respect or cultivate collegiality among citizens and resident aliens. While the emphasis ranged from *jus solis* in France to *jus sanguines* in Germany, few European nations initially offered the promise of full citizenship rights to the immigrants and only begrudgingly provided them with services. Recently, legal membership has been extended but few citizens have embraced diversity. Ethnic riots and civil unrest have been the results.[871]

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[869] Markham, *Plurality & Christian Ethics*, pp. 107.
[870] Moises Naim, "Arabs in Foreign Lands," *Foreign Policy Magazine* (May/June 2005), p. 148 accessed at http://www.foreignpolicy.com/story/cms.php?story_id=2781on 3/7/08. *See* Kristine J. Ajrouch, "Global Contexts and the Veil: Muslim Integration in the United States and France," *Sociology of Religion*, Vol. 68, No. 3 (2007), pp. 321-325.
[871] Jane Kramer, "The Dutch Model: Multiculturalism and Muslim Immigrants," *The New Yorker* (April 3, 2006), pp. 60-67, at pp. 63-65.

Markham offers the United States as a contrasting model of a pluralistic welcome. He commends America as a religiously informed culture that affirms all religions rather than enforcing secularism.[872] As a nation of immigrants, the U.S. did indeed learn to affirm as well as tolerate plurality of beliefs. Key to this discovery was both the separation of church from state and the protection of religious exercise. As David Hollenbach asserts, these U.S. civic ideals opened the public square to the civic involvement of faith groups unassociated with governmental power and free from coerced religious privatization.[873]

Nonestablishment may be interpreted as permissive of public religious activity and complimentary to social expression of religious freedom.[874] For this reason, Hollenbach frames political freedom of religion as a companion to interactive social solidarity. He emphasizes the strength of the American system which both welcomes religious support of the civic common good and differentiates religious expressions within the public political sphere from state governance. Religious freedom allows religious organizations and persons of conscience to openly critique their government and to voluntarily offer their resources for the common good. In addition, the state is more likely to stay true to its commitments and to neutrally focus its assets on the general welfare.

Rather than enforcing secularism like France, licensing religion like Germany, or imposing state religion as in Britain, the U.S. provides protections for the faith practices and religious expression.[875] I agree with Markham's assertion that the United States offers the world a new vision beyond established religion or enforced secularization. As

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[872] Markham, *Plurality & Christian Ethics*, pp. 107, 192-194.
[873] Rogers Smith, *Civic Ideals* (New Haven, CN: Yale University Press 1997), pp. 496-498, 488; David Hollenbach, *The Common Good & Christian Ethics* (Cambridge, UK: Cambridge University Press 2003), pp. 118-119; Ian S. Markham, *Plurality & Christian Ethics* (Cambridge: Cambridge University Press 1996), pp. 25, 129, 194-195.
[874] Hollenbach, pp. 119-120.
[875] *See* Kristine J. Ajrouch, "Global Contexts and the Veil: Muslim Integration in the United States and France," *Sociology of Religion*, Vol. 68, No. 3 (2007), pp. 321-325, at p. 322.

he insists, Americans have discovered that the public square is enriched by an open dialogue among persons of all religions and beliefs, whether sharing minority faiths or little held ideologies. Ultimately welcomed into the public square, citizens holding diverse beliefs are free to openly voice their thoughts and contribute their gifts.[876]

I would also add one more point. U.S. history demonstrates that this discovery is the result of the successive challenges mounted by religious minorities. Their belief in the founding ideals of America and determination to make those ideals a reality has assisted the ongoing development of American citizenship norms. As Harvard law professor Martha Minow insists, these faith communities' efforts at political self-assertion have helped to define them as full citizens of the American republic and to encourage their investment in the broader society even as they seek to change it.[877]

As demonstrated by the four dimensional citizenship model, the legal and civic challenges brought by religious minorities have moved U.S. citizenship beyond negative rights, dutiful privileges, ascriptive membership, and passive participation. Despite uneven progress and discriminatory impulses, American citizenship norms have moved toward civil rights, common duty, equal membership, and active participation. Popular understanding of citizenship's requirements has advanced from dissenting Protestant insistence on religious liberty to Catholic demands for tolerance to Orthodox Jewish pleas for acceptance. America's Muslims now assert their rights to active participation. Our receptiveness to their efforts will not only affect the openness of U.S. culture, but will reveal the relative strength and veracity of our own citizenship ideals.

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[876] Markham, *Plurality & Christian Ethics*, pp. 129, 194-195.
[877] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca : Cornell University Press, 1990), p. 377; *See also* Seyla Benhabib, *Transformations in Citizenship: Dilemmas of the Nation State in the Era of Globalization* (Amsterdam: Koninklijke Van Gorcum 2001), p. 40.

E. The Strength of U.S. Citizenship Ideals: Required Virtues & Integrative Dreams

One of America's greatest strengths has been our ideals of citizenship. These ideals nurture a sense of belonging to a nation sharing virtues and visions greater than any single individual, yet still protective of each person's human rights. It is a notion of inclusive citizenship that balances the elements of rights, duty, membership, and participation in a manner that makes optimal space for democratic governance. The American understanding is that rights are the inalienable possession of each human being regardless of creed, gender, ethnicity, or race. Such rights entail the responsibility to value all persons' consciences and to provide for everyone's basic social needs. These principles embrace the duty to uphold the privileges that citizenship imparts to self and to meet the obligation of contributing to the common good. American citizenship norms extend a liberal invitation of membership to all willing people, coupled with the free grant of individual legal status ensuring the rights to free expression and to voluntary exit of confining identities. Finally, American citizenship norms seek to extend equal opportunity for active participation in governance along with protection of the right to passively demure.

In Europe, multiculturalism has failed because it has not welcomed immigrants or embraced their differences. Guest workers might have been offered work and housing, but full citizenship was discouraged and at best reserved for their children. State religious establishment coupled with increasing secularization have made diverse creeds suspect and religious lifestyles mistrusted.[878] By contrast, the United States was founded by immigrant dissidents who disestablished all religion so that they could freely choose their

[878] Moises Naim, "Arabs in Foreign Lands," *Foreign Policy Magazine* (May/June 2005), p. 148 accessed at http://www.foreignpolicy.com/story/cms.php?story_id=2781on 3/7/08.

faith. Not only has faith been valued, but public space has been made for free speech and religious exercise. As a result, religious minorities have been a continued source of social critique, political challenge, and legal expansion of American citizenship norms.

This unique balance of U.S. citizenship elements opens to Americans not only expansive opportunities for economic advancement, but the great potential for democratic governance. These are the reasons that immigrants continue to flood U.S. shores in the hopes of a better life. And, these norms have been the reasons why American citizens together, Protestant – Catholic – Jewish – Muslim – Agnostic - Atheist, defend her ideals and her shores. As previous generations understood and the Civil Rights Movement sought to guarantee, to be an American is the accretion of a larger positive identity not the loss of defining personal characteristics. Membership at its best requires the embrace of liberal ideals and civic friendship, not the crush of conformity nor the oppression of ascriptive assimilation. Yet, it is up to each citizen to help create a social system whereby everyone might seize these ideals and make them a reality.

Law provides the nexus where the four elements of citizenship meet aspirations of assimilation or integration. At certain times, the rule of law has proven the guardian of our liberties; at other times, it has served as the enforcer of social conformity. The U.S. Supreme Court may proclaim citizenship values, but the majority must enact those norms through their everyday choices and actions. Deeply held, American democratic values often have inspired citizen discomfort with dominant behaviors inconsistent with those ideals. Yet, their conscious faith has strengthened their resolve to actively challenge popular missteps. As demonstrated by minority religious appeals, freedom of conscience has strengthened the nation if only by protecting personal beliefs and nurturing the

confidence to act upon them. The courageous actions of faith-filled minorities have served to instill, broadened, and enrich American citizenship values over time. When at times their efforts have failed to curb nativism, the responsibility rests upon the nation's courts to protect minority freedoms. More recently when the U.S. Supreme Court failed to recognize discriminatory if indirect impacts upon freedom of conscience, some of the newest members of the American public acted upon the inclusive American norms which they have come to accept.

Minority religious challenges have pushed both legal institutions and individual citizens to expand their definitions of U.S. citizenship. They have also provided the impetus for the evolution of American citizenship norms from liberty of conscience to tolerance of difference to acceptance of diversity. Muslim Americans offer the most recent and urgent opportunity for the U.S. to embrace its highest ideals, moving toward intentional welcome and active integration of all her citizens.

F. Policies for the Future of U.S. Citizenship

Looking toward the future, the historic effects of U.S. Supreme Court decisions upon the integration of religious minorities prove that institutional policies do influence citizenship norms and can create public openness to persons of difference. In the past, the Court's positions have been uneven. At times, its decisions have bolstered religious liberty and in other instances have encouraged ascriptive conformity. Despite periodic recurrences of Nativism, American citizens largely have retained the movement toward inclusiveness, even if only through lip service. These values have provided a rich

resource to those courageous defenders of liberty who challenge public pressures for conformity and demand an end to discriminatory practices.[879]

Through reference to the founding principles of religious liberty and the heritage of growing democracy, minority religious leaders like Rev. Roger Williams, Fr. John A. Ryan, Rabbi Mordecai Kaplan, and Imam Wallace Deen Muhammad have garnered public support for more inclusive citizenship norms. And, ordinary American citizens also have embraced their religious identities and sociological differences while demanding public recognition that they too are American citizens. Through judicial appeal to the United States' Constitutional ideals, ordinary persons such as Dartmouth President Wheelock, the teaching Society of Sisters, Orthodox Jewish Shopkeeper Braunfeld, and the Muslim Orthodontist turned activist Dr. Tabbaa, have expanded our concept of the American citizen.

In the future, American citizenship norms can only be strengthened by the continuing challenges of religious minorities. For this reason, public policy must encourage the active participation of religious minorities and resist all attempts to inhibit their efforts. Further, government institutions and civic organizations must respect the rights of all citizens regardless of their beliefs. In this way, they can support the expansion of citizenship norms toward full integration of minorities.

Today, major advances in American citizenship values are occurring on the local level. Increasing numbers of ordinary U.S. citizens are taking part in interfaith dialogues, joining multi-faith organizations, and participating in cooperative religious social service

[879] *See* Martin Luther King, *I Have a Dream* (New York: HarperSanFrancisco 1992), pp. 102-106.

efforts.[880] Through open expressions of religious values, citizens are contributing to civic morality and serving the public needs. These activities improve understanding, strengthen civic friendship, and benefit the common good. Further, they contribute to the expansion of citizenship norms beyond tolerance and acceptance.

More needs to be done on a federal and state level to support these advances in citizenship values. While national security and domestic welfare are important concerns, government policies must not emphasize these matters at the expense of religious liberty and human rights. Public policies must equitably balance these interests while implementing measures that secure American ideals of liberty and tolerance. As the voice of the people, legislatures in particular should curb reactive, nativist responses to minorities' religious adaptations to American life. Instead, these representatives can be the voice of reason and discernment regarding the distinct interventions and beneficial resources provided by diverse religious communities. The executive branches may provide cohesive leadership and support civic understanding that bridges the divisions within our religiously plural society. Finally, the U.S. Supreme Court, as self-proclaimed protector of Constitutional rights, must zealously protect the ability of religious believers and communities to practice their faith as well as express their precepts in public and private. At the same time, the high court must establish fair, equitable limits on religious activities and beliefs that harm others. In this way, the Supreme Court can both equitably guard the nation's citizens and judiciously support the expansion of U.S. citizenship norms toward full integration of minorities. As in the past, official affirmation of

[880] In the author's hometown of Atlanta, Georgia, such organizations include the Faith Alliance of Metro Atlanta, Atlanta World Pilgrims, and the Interfaith Children's Movement of Metropolitan Atlanta.

minority faith communities' religious rights and civic contributions can heighten American allegiance and inspire social cohesion.

U.S. citizens are learning to welcome diverse viewpoints and encourage civic enrichment from the many individuals and groups within American society. Significant numbers are joining together to combat social issues such as poverty, child neglect, and global warming. As they work with one another, religious biases and discriminatory barriers are felled in the wake of genuine friendships and civic alliances. Through these cooperative efforts, the United States stands to reap the rewards of civic peace, public cooperation, and increasing social welfare. In a world marked by increased religious and ethnic conflict, United States citizens have continued to enjoy a relative domestic peace.

Americans of all beliefs have come to recognize that separation of church from state offers protection to both. And, many appreciate that their own freedom of religious exercise necessitates the religious liberty of their neighbors. Only in such an atmosphere can persons develop genuine piety, enjoy true freedom, and experience domestic tranquility. Together, we must continue to work toward acceptance of religious diversity and the embrace of difference. Only then will we enjoy true security and contribute to peace throughout our world.

G. Promise of American Citizenship: Welcoming Muslims into Civic Friendship

If Ian S. Markham is correct and the religious affirmation of pluralism is the United State's gift to the non-Islamic West, then it must be writ large as civic friendship and cooperation across divisions of religion, ideology, ethnicity, and race. The promise of America is her offering of the ideals and experiences that support the defense of diversity

based upon religious faith, not despite it. Through a history of mass immigration and increasing diversity, the United States has imagined itself as a beacon for the oppressed and a safe haven for the persecuted.

Although the reality has frequently been something less, the overall historical trend has been toward inclusion and integration. Free speech and assembly have supported public admissions of inconsistency and encouraged integrity in the pursuit of liberty and equality. Through the ideal of religious liberty, the U.S. has allowed immigrants to cling to their enduring faith identity free from expectations of assimilation and cultural conformity.[881] Through the constitutional guaranty of individual rights, the United States has succeeded in encouraging faith-filled devotion while inviting religious diversity.

During the Enlightenment era, the humanist ideals of Jefferson and evangelical sensibilities of Madison inspired the public embrace of religious liberty. Prompted by a conflict between Protestant groups, the U.S. Supreme Court under Justice Marshall provided the legal theory of state-church separation that enabled governmental religious disestablishment and individual free exercise. In answer to Catholic challenge, the high court supported the personal right to choose parochial education over public schooling. More recently, the Supreme Court's attempt to support a common day of rest despite the restrictive impact of blue laws upon Orthodox Jews was transcended by popular behavior accepting of Sabbatarian business practices.

Today, Muslim Americans eagerly grasp for the promise of full American citizenship. They understand that our country's founding ideals are universal liberty and equality. And they press U.S. citizens to honor these values and make good upon our promises.

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[881] Caitlin Killian, "From a Community of Believers to an Islam of the Heart: 'Conspicuous Symbols, Muslim Practices, and the Privatization of Religion in France," *Sociology of Religion*, Vol. 68, No. 3 (2007), pp. 305-320, at p. 307.

While noting grave American missteps, U.S. Muslims acknowledge that they enjoy a level of religious freedom and personal expression largely unavailable elsewhere.[882] And, they have witnessed not only the civic call for tolerance, but the public search for understanding since 9/11. While retribution has incited some hate crimes and fear has prompted discriminatory practices, there have also been generous outpourings of civic friendship toward Muslim citizens. And, Muslim Americans have engaged in an unprecedented response by opening their worship spaces, providing religious education, and becoming involved in interfaith efforts. Within this dialectic, there lies the potential for strengthening and extending the American ideal of citizenship.

Emphasizing the balance between rights, duty, membership, and participation, American citizenship stands as a secular ethic of promise. It is a normative system which exacts liberty, demands democracy, requires equality, and urges participation. And yet, it offers in exchange a covenant of respect for inalienable rights as well as a pledge of communal support, inclusive membership, and full participation.

Through recognition of inalienable human liberty, the Declaration of Independence coupled with the Constitution's Bill of Rights created the normative bases for the American welcoming and integration of religious minorities into U.S. society. From the beginning, the law of the United States recognized that religious liberty is a basic human

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[882] *See* Ihsan Bagby, "Isolate, Insulate, Assimilate," *A Nation of Religions*, S. Prothero, ed. (Chapel Hill, NC: University of North Carolina Press 2006), p. 40 which quotes the following from Muqtedar Khan's "A Memo to American Muslim Leadership': "Muslims love to live in the U.S. but also to hate it … As an Indian Muslim, I know for sure that no where on Earth, including India , will I get the same sense of dignity and respect that I have received in the U.S. … It is time that we acknowledge that the freedoms we enjoy in the U.S. are more desirable to us that superficial solidarity with the Muslim world." Diana L. Eck, *A New Religious America* (New York: HarperCollins Publishers, Inc. 2001), p.361 which quotes one young Muslim woman, a legislative aid in Washington, D.C. as saying: "Politics is more open here than anywhere in the world." *See also* Haddad, *Not Quite American?*, p. 32 which attributes similar statements before Muslim American audiences to Rashid Ghannushi of Tunisia.

right and not a conditional freedom granted by the State.[883] Citizens possess both an inherent right against the coercion of a state established religion and also the innate freedom to exercise their own beliefs. While the state may be the arbiter of civic values, it can not dictate citizens' moral doctrine nor define their transcendent reality. Through its interpretation of the Establishment Clause as separating church from state, the U.S. Supreme Court requires the State to function non-ideologically and to provide maximum freedom for competing viewpoints.[884]

Set by the Declaration of Independence and U.S. Constitution, the normative trajectory of American citizenship aims toward integration. Its values espouse respect for difference and support the retention of religious, ideological, ethnic, racial, and cultural distinctiveness. At the same time, its principles invite the diverse citizenry to become one people. Integration embraces the positive offerings of all members, empowering their spirits as it incites their loyalty to the larger community.

The democratic aim of social integration is strengthened by emerging norms of welcome and civic friendship. Religious, ethnic, and racial minorities are to be actively welcomed and enthusiastically embraced as citizens who offer valuable communal resources from their distinctiveness. While forced conformity breeds malice and rancor, integration invites contribution and cooperation. Only inclusion and respect can diffuse radicalism and vengeance. Although some forms of assimilation may be necessary for national cohesion, integration works to ensure that the costs of civic membership are more equally distributed among all Americans and bear a rational relationship to the benefits.

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[883] *See* James Hitchcock, *The Supreme Court and Religion in American Life,* Vol. II (Princeton, N.J.: Princeton University Press 2004), p. 140.
[884] Hitchcock, p. 146.

Welcome and civic friendship are the promise which the developing American understanding of citizenship extends to all persons. The civic perception of these norms has evolved from a tolerance that avoids adverse judgment to a minimal acceptance of difference.[885] Now, U.S. society is being challenged once again to broaden its civic ideals. Following the events following September 11, Muslim American civic participation and legal challenges accentuate the need for renewal of our civic ideals.

Welcome and civic friendship go beyond tolerance to offer ardent inclusion of persons as full citizens and respectful receipt of their differences as unique contributions that enrich American society.[886] Openness to religion enables American public culture to receive the valuable resources offered by religious communities for healing divisions, encouraging cooperation, and developing civic friendship. Such norms inspire voluntary integration, but do not require it. Neither do these ideals require acceptance of U.S. culture or oblige assimilative conformity. Religious minorities retain the inherent freedom to retreat into their own private sphere to the exclusion of the rest of American society.

These new, receptive civic norms promise a greater balance of rights, duty, membership, and participation for all citizens. Under these values, the rights of believers and nonbelievers alike are neutrally protected by the government. Recognition of equal rights and appreciation for diverse gifts inspires and encourages every citizen to willingly assume his/her civic duty to the community. Ardent embrace of difference extends the boundaries of membership to include all persons and communities. Finally, enthusiastic

[885] For definitions of the terms "tolerance," "acceptance," and "welcome," see Chapter 1- C. Working Definitions & Understandings.
[886] Welcoming is used as a robust political concept bearing theological support from all three Religions of the Book, namely Judaism, Christianity, and Islam. *See* Appendix I: Supporting Theologies.

inclusion of individuals and groups motivates active participation in both private venues and the public square.

The principles of this developing U.S. citizenship ethic not only present promise. These norms evoke responsibility as much as they extol freedom. It invites religious persons and communities to voluntarily accept the duties of citizenship and participate in American society. Many have willingly accepted the summons. Through interaction with the majority culture, minority religious groups have challenged citizenship ideals initially shaped by a predominantly Protestant elite, sometimes at great cost. And, as the US has become a more commercialized culture, minority faith communities have contested the individualism, consumerism, and negative rights of this culture with their own communal models of sacrifice, common good, and shared provision. Likewise, American citizenship norms confront religious communities with more democratic forms of authority, heightened tolerance, greater inclusiveness, and deeper respect for the individuality of their members.

Today, Islam offers the United States both a challenge and a gift. It challenges U.S. citizens to examine their espoused values and push beyond mere tolerance and simple acceptance toward the intentional embrace of the communal gifts born from difference. Islam's gift is its people. Together, they bring to our country the richness of their diversity, the breadth of their political experiences, the wisdom of their religious *umma*, and a loyalty born from our vision of genuine liberty.

G. Final Thoughts

Like the cracked Liberty Bell, our human aspirations for freedom, justice, and equality are imperfect. Yet, U.S. citizens continue to strive toward these ideals of citizenship. In the process, we have learned that such values do not reside elevated on gilded altars, detached upon grand bemas, nor isolated atop minaret spires. Rather, as the Liberty Bell, American citizenship norms rest on the secular ground shared by people of all manner of conscience, creed, ethnicity, and race. Muslim and Jew, Catholic and Protestant, atheist and agnostic – we are all American citizens. As such we are all bound together by the values of the nation we embrace and the civic relationships we share. Together, we shoulder the responsibility to define the citizenship of the United States – to determine the nation we are today and the people we will become tomorrow.

Appendix I:
Supporting Theologies

The U.S. Constitution and Bill of Rights not only prohibit government establishment of religion, but guarantee the freedom to exercise one's faith. In so doing, the Constitution ensures that religion continues to occupy a place in American society. Faith communities possess many resources that may be used to support or undermine the nation's political-social order, such as sparking motivation, training skills, and mediating networks of involvement.[887] Chief among these assets is the theology by which people of faith construct and critique reality. For these reasons, religious theologies remain key components of the interaction of religion and politics within the U.S.

Each of the three minority faith traditions which are the subject of this dissertation, offer theological underpinning for the key concepts that David Hollenbach argues are crucial to the American polity: recognition of the common good, distinction between divine and temporal authority, and the rejection of religious coercion.[888] This claim is supported below by a brief, and by no means exhaustive, exegesis of the scriptures and examination of the traditions of Judaism, Christianity, and Islam.

This tripartite theological review is undertaken in the order of Hollenbach's mediating model of political/legal and religious interaction offered in his book, *The Common Good*

Please note that all references to holy scriptures are taken from one of the following three sources:
Tanakh: The New JPS Translation According to the Hebrew Text (Philadelphia & Jerusalem: The Jewish Publication Society 1985).
The HarperCollins Study Bible: New Revised Standard Version (New York: HarperCollins Publishers 1989).
The Meaning of The Holy Qur'an, 'Abdullah Yusuf 'Ali, trans. (Beltsville, MY: Amana Corporation, 10th ed. 1997).

[887] Alejandro Portes and Ruben G. Rumbaut, *Immigrant America* (Berkeley, CA: University of California Press, 3d ed. 2006), pp. 302-306; David Hollenbach, *The Common Good & Christian Ethics* (Cambridge, UK: Cambridge University Press 2003), p. 104.
[888] *See* David Hollenbach, *The Common Good & Christian Ethics*, p. 104, 118-119; Ian S. Markham, *Plurality & Christian Ethics* (Cambridge: Cambridge University Press 1996), pp. 25, 129, 194-195; Rogers Smith, *Civic Ideals* (New Haven, CN: Yale University Press, 1997), pp. 496-498.

& Christian Ethics.[889] His dialectical binary is devised in an attempt to defend his contention that religion legitimately played an important normative role in U.S. politics. Hollenbach argues that the First Amendment guarantees offer a differentiated structure for church-state relations that afford both church and state independence while simultaneously opening space for civic involvement of faith groups. Under the American system, religious groups may publicly express their faith and freely criticize the government so long as they remain unassociated with governmental power and free from coerced religious privatization. Hollenbach's model is developed to support this U.S. brand of political/legal and religious interaction while offering Catholic theological support for the American system.

While Hollenbach's model originally utilized only Christian tradition, this appendix demonstrates that Judaism, Christianity, and Islam all contain theologies that support the normative religious elements Hollenbach finds key to American civics. In so doing, it is my contention that his model may be adapted to the theological realities of our study which include Judaism, Christianity, and Islam.

Hollenbach offers a two-step model that frames political freedom of religion as a companion to interactive social solidarity. He insists that separation of church and state does not preclude a public role for religion. Rather, nonestablishment may be interpreted as permissive of public religious activity and complimentary to social expression of religious freedom.[890] Through his two steps, he demonstrates that strong Christian convictions can fully support the civic common good with all its religious diversity. Through adaptation of Hollenbach's model, this appendix will demonstrate that Judaism,

[889] David Hollenbach, *The Common Good & Christian Ethics* (Cambridge, UK: Cambridge University Press 2003).
[890] Hollenbach, pp. 119-120.

Christianity, and Islam all provide theological support for civic values of membership and belonging, welcome and hospitality, differentiation of divine and temporal authority, moral critique of political authorities, and rejection of religious coercion. Following a brief explanation of each step in Hollenbach's model, supporting theological ethical reflection is presented from each of the three minority religious traditions.

First, Hollenbach demonstrates that the Christian tradition values the good of all persons.[891] In fact, a theology of **belonging and membership** as well as **welcome and universal hospitality** may be found in all three traditions of Judaism, Christianity, and Islam. In Judaism, the Israel is defined by its covenant with God, a relationship that requires obedience to God and the Torah, including its obligations regarding the just treatment of others.[892] The Torah defines the neighbor broadly, while prophetic voices constantly remind Israel to take care of strangers as well as orphans and widows, for they too were once strangers in Egypt.[893] Universal hospitality is revered and promoted as opportunities to entertain angels unawares, just as Abraham and Elijah did.[894]

In Christianity, Jesus welcomes all who believe that He is the Son of God and does the will of His Father in Heaven.[895] Central to this belief is adherence to His universal commandment to love God with all one's mind, heart, and soul as well as to love the neighbor as one's self.[896] Asked to define neighbor, Jesus tells the story of the Good Samaritan which describes him or her as whoever we might witness in need within our

[891] Hollenbach, p. 114, 134-136.
[892] The Tanakh: Lev. 19:1-37; Deut. 5:1-29, 11:13, 28: 1 & 69-29:1, 30:15-20.
[893] The Tanakh: Lev. 19:18; Deut. 10:17-19, Deut. 15:11, Isa. 1:17, Jer. 22:16, Eze. 18:5-13; Am. 5:11-14; Zec. 7:10.
[894] The Tanakh: Gen. 18:1-12; Ezekiel 40:3. *See also* Daniel 8:16 and Zechariah 1:9.
[895] The Bible: Matt. 7:21, 16:15-17; 26:63-64, and 28:18-20; Mk.8:29; Lk. 9:18-22; 23:39-43, 24:36-49: John 3:31-35, 6: 60-65, 10: 7-9, 14:121, and 20:24-29.
[896] The Bible: Matt. 36-40; Mk. 12:28-34; 15:39, 16:6-7; Lk. 25:28; John 13:34-35.

daily life, regardless of their race, class, religious affiliation, or social status.[897] Through stories of Jesus' relationships with His followers, we learn that gender, illness, and poverty also are not relevant to the definition of neighbor.[898] Promoting love as the central value, Christ insists not only on universal hospitality, but as in Judaism, requires care for all those least fortunate.[899] Jesus teaches that one must love one's enemies and do good to those who persecute one if one truly is to be a child of God.[900]

In Islam, the Qur'an enjoins peace through total submission to the will of God necessitating faith, worship, fasting, and pilgrimage, as well as charity to others.[901] While stressing the faithful's membership in the *umma* (or the Muslim community of believers), the Muslim word of God stresses virtuous behavior and good deeds toward one's fellow humans. The fellow includes *qarayeb* (kinsman), *ukhuwwah* (brother Muslims), *yatim* (orphan), *thayyibat* (widow), and *faqir* (poor/needy), along with the *sabil* (fellow traveler) and *an-nafs al-lawwamah* (chance companion).[902] Hospitality must be shown to all including parents, kin, orphans, poor, neighbors, and strangers.[903]

Yet as Marc Gopin and David Hollenbach remind us, all religious traditions contain messages of exclusion and intolerance as well as membership and welcome.[904] Muslim scholars remind the faithful that while the Qur'an is the inerrant word of Allah, the reader must approach with the right intention and exercise the prescribed external ablution

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[897] The Bible: Lk. 10:25-37.
[898] The Bible: Matt. 15:21-28; Mk. 1:29-34, 5:21-43, 7;24-30; Lk. 13:10-13; John 4: 7-42, 8:2-11, 9:1-12,
[899] The Bible: Matt. 25: 41-46.
[900] The Bible: Matt. 5: 44-45. Lk. 6:27-31.
[901] The Holy Qur'an 22:78; 4:135; 4:103; 2:183: 2:43; 22: 77-79. *See* Dr. Javed Jamil, *The Essence of the Divine Verses* (Saharanpur, India: Mission Publications 2002), pp. 168-175.
[902] The Holy Qur'an 2:83; 33:35, 2:83; , 2:177 and 2:215, 2:177, 2:271 and 9:60; 2:177; 4:36.
[903] The Holy Qur'an 4:40. *See* Thomas Patrick Hughes, *Dictionary of Islam* (New Delhi, India: Cosmo Publications 1978) p. 177 for hospitality as defined by the Qur'an and the Islamic tradition.
[904] Marc Gopin, *Between Eden and Armageddon* (Oxford: Oxford University Press 2000), pp, 199-206; Hollenbach, *The Common Good & Christian Ethics* (Cambridge, UK: Cambridge University Press 2003) pp. 113-114.

(*wudu*).[905] In fact, it is the Holy Qur'an which urges that competition between diverse peoples be focused upon goodness and moral virtue rather than evil and vice.[906] Thus, it is up to members of all religious traditions to recognize and capitalize on the scriptural messages of welcome and peace, tempering contrary passages with faith in the overriding theme of divine mercy guiding a human compassion anchored in piety and reason.

Second, Hollenbach insists that differentiation of church and state does not negate religious expression and activity in the public realm.[907] Various Protestant traditions, particularly those with Calvinist origins, also have rejected the distinct separation of religious pursuit and public life.[908] Like Catholicism and some Protestant faiths, Judaism and Islam traditionally have refused to relegate religion to the private sphere separated from public life. However, Hollenbach rightfully insists that differentiation of religious and public spheres do not prevent religious insight from impacting secular life in a free society. Nonestablishment does reject state enforcement of any particular religious belief, but it does not prevent the public expression or free exercise of any religious community. What is required of religions in a plural secular setting remains the affirmation of freedom of conscience.

In Jewish, Christian, and Islamic traditions, the **differentiation between flawed earthly governance and perfect heavenly judgment** are recognized. The Tanakh recognizes God as creator of heaven and earth, but notes that earth is corrupt in God's sight.[909] Repeatedly, God is presented as Lord and Judge over the earth.[910] The Children

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[905] Shaykh Fadhlalla Haeir, "Introduction," *Commentary on the Qur'an* accessed at http://nuradeen.com/reflections/SuratYaSinIntro.htm on 3/30/08.
[906] The Holy Qur'an, 5:48.
[907] Hollenbach, p. 118-120.
[908] Hollenbach, p. 116.
[909] Genesis 1:1, 6:11.

of Israel are warned not to put their trust in temporal illusions, but rather to have faith in the Lord and act justly toward their fellow humans.[911] God rules over imperfect earthly Kings and Priests, admonishing all to follow His ways.[912]

In the Christian Bible, Jesus specifically distinguishes the duties due the temporal emperor from those due God.[913] Throughout the Scriptures, He distinguishes the coming Kingdom of God from the flawed kingdoms of this earth.[914] Jesus constantly admonishes his followers to seek first the heavenly kingdom, which is greater than earthly nations.[915] True power rests in the things of this world, but comes from God.[916] This biblical heritage is the foundation for Augustine's *City of God*, which contrasts heavenly perfection from the mix of Godly and temporal power present in the earthly City of Man. As Hollenbach points out, it is Augustine's distinction that "desacralizes" political power and underscores the "imperfectability of political affairs."[917] Subsequent generations of Christians have drawn upon both the Biblical tradition and Augustinian skepticism to hold temporal power accountable to God's Commandments.

The Qur'an also distinguishes heaven from earth. The faithful are counseled not to be deceived by the glamour of this world, but to strive through faith and virtue for paradise in the next life.[918] Allah is not only the creator of all life, but the ultimate sovereign and

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[910] Genesis 3:23 and 18;25, Ex. 6:6-8 and 34:9; Judges 1:2 and 2:18-21; 1 Samuel 2:1-10; Isaiah 1:2-10; Jeremiah 7:3; 1 Ezekiel 33:20; Psalms 47:7 and 96:13; Chronicles 16:8-33.
[911]Exodus 16: 2-30; Isaiah 30: 15-18; Jeremiah 7:3-7.
[912] II Samuel 12: 1-23; Hosea 3:5, 4:4-6: , 12:3-7, 13:9-10.
[913] Matthew 22:15-21; Mk. 12: 13-17; Lk. 20:21-25.
[914] Matthew 4:17 and 9:35; Mark 4:26; Luke1:33, 7:28, 22:29, and 23:42; John 18:36.
[915] Matthew 6:33 and 13:44; Mark 10:15; Luke 18:16; John 3:3 and 3:5.
[916] Matthew 2:29; Mark 12:24; Luke 22:66-69; Acts 8:10; and Romans 1:16.
[917] Hollenbach, p. 125.
[918] The Holy Qur'an 2:12, 4:77, 7:43, 19:63, 28:85, 43:72, 87:16-17. *See* Mustansir Mir, *Dictionary of Qur'anic Terms and Concepts* (New York: Garland Publishing, Inc. 1987), pp. 61-62, 91-93.

judge.[919] Even temporal rulers must obey Allah's commands and face Allah's judgment.[920] While Muslims are instructed to "obey God, the Messenger, and those who are in authority from among yourselves,"[921] Allah's precepts remain supreme.[922] Based upon such admonitions, Medieval Muslim intellectuals theorized a tension between ruler and the *'ulmma* composed of scholars and jurists who interpreted scripture, tradition, and *shar'ia.* Their works supported juridical independence from political authority as well as subsidiary institutions mediating the imam's executive and the *'ulama*'s judicial authority.[923] In this way, groups of religious specialists gained traditional sanction to hold accountable the earthly ruler – although the weight of their influence and extent of their independence has varied according to time, location, and context.[924]

In addition, all three traditions recognize that genuine **religious faith must be freely adopted and can not be coerced**. Hollenbach cites the Vatican II *Declaration of Religious Freedom* as the Catholic concession of the universal right to religious freedom.[925] Recognizing such freedom as inherent respect for human dignity, the Catholic Church formally rejected religious coercion and accepted non-establishment as the governmental consequence. Still the Vatican affirmed the public engagement of religious communities as another aspect of religious freedom.[926] This Vatican declaration

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[919] The Holy Qur'an 4:41, 25:1, 43:;84, 51:56,,.
[920] The Holy Qur'an 4:59, 17:71, 25:1. *See* Javed Jamil, *The Essence of the Divine Verses*, p. 247.
[921] The Holy Qur'an 4:59. *See* Fazlur Rahman, *Major Themes of the Qur'an* (Minneapolis, MN: Biblioteheca Islamica 1980), p. 44.
[922] The Holy Qur'an 4:135, 7:29, 13:37, 16:90, 25:1. *See* Jamil, *The Essence of the Divine Verses*, pp. 168, 253.
[923] Hasan Hanafi, "Alternative Conceptions of Civil Society: A Reflective Islamic Approach," *Islamic Political Ethics*, S.H. Hashmi, ed. (Princeton: Princeton University Press 2002), pp. 60-61.
[924] Hanafi, p. 60. *See also* L. Carl Brown, Religion and State: The Muslim Approach to Politics (New York: Columbia University Press 2000), pp. 31, 33, 38, 41-42, 100-102. Note that "the *ulama* were honored to the extent that they remained "above politics." Brown, p. 102.
[925] Hollenbach, pp. 116-117.
[926] Hollenbach, p. 119 referencing Vatican Council II, "Dignitatis Humanae," *Declaration on Religious Freedom*, no, 2 which can be found in Austin Flannery, ed., The Basic Sixteen Documents of Vatican

refuted the earlier Catholic position that "error has no rights." In doing so, the Roman Catholic Church recognized the secular compromise which arose out of the Protestant Reformation.[927]

The most ancient of the three religions, Judaism defines Jews as the "chosen people of God."[928] Yet, the Jewish scriptures acknowledge that those outside their faith community can be righteous.[929] Even before Moses receives the Torah at Sinai, the Jewish scriptures recognize that all people are descendants of Noah (and actually Adam and Eve) and thus, view as upright all those who followed God's directives to Noah.[930] Through God's giving of the Torah and the covenant, the Jewish people understand themselves as bearing a special responsibility to be "a light unto the nations."[931] The Jews view the Decalogue as currently binding only upon them and understand that good people exist outside of their own tradition.[932] In the book of Micah, tolerance toward other religions was explicitly expressed: "All the nations may walk in the name of their gods; we will walk in the name of the Lord our God for ever and ever."[933] Jewish scripture contains the fervent belief that in the end times, other peoples will turn to them for theological

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Council II: Constitutions, Decrees and Declarations (Northport, NY: Costello Publishing Co. 1996), pp. 551-568, at pp. 559-560.

[927] Paul Johnson, *A History of Christianity* (New York: Atheneum 1987), p. 293 (noting the Polish nobility's 1573 promulgation of the Warsaw Confederation declaring religious freedom as the solution to widespread disagreement related to Christian religion within the state) and p. 332 (referring to the 1648 Peace of Westphalia). Regarding John Courtney Murray's inspiration from U.S. Constitutional Law in drafting Dignitatis Humanae, see Jay P. Dolan, *In Search of an American Catholicism: A History of Religion and Culture in Tension* (Oxford: Oxford University Press 2002), pp. 158-162; 250-252 and Hans Kung, *My Struggle for Freedom: A Memoir* (Grand Rapids, MI: William B. Eerdmans Pub. Co. 2003), pp. 419-420.

[928] The Tanakh: Deut. 7:7-8, 14:2; Ex. 19:5-6;

[929] The Tanakh: Gen. 8:20-33; 1Samuel 26:23; Isaiah 26:9, Jeremiah 18:5-10; Psalms 9:8, 33:5, 45:7 96:13,98:9; Proverbs 11:6, 14:34,15:9.

[930] The Tanakh: Gen. 11:6. See Asher Maoz, "Religious Freedom as a Basic Human Right: The Jewish Perspective," Annuario Direcom 5 (2006), p. 105 accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013512#PaperDownload on 3/31/2008.

[931] The Tanakh: Isa 42:6; 49:6.

[932] The Tanakh: Jer. 18:5-10; Prov. 14:34.

[933] The Tanakh: Micah 4:5. *See* Maoz, p. 107. *See also* Exodus 19:5-6.

direction and they have the responsibility to assure that all of these people will attain unity in God's presence.[934] Since that time, many Jewish scholars have emphasized these messages of religious tolerance and insisted that Jewish choseness does not impart superiority.[935] Maimonides taught that "we do not coerce him [a Gentile] to accept Torah and commandments."[936] More recently, some have insisted that the Tanakh supports modern concepts of tolerance and freedom of religion.[937]

In Islam, the Qur'an explicitly recognizes that Allah created human diversity and a plurality of religions. Further, the holy book insists that such diversity fulfills Allah's will that people learn from one another.[938] It recognizes equality among the entire human race, insisting that the only distinction among persons is related to goodness and virtue (*taqwa*).[939] Forcefully, it asserts that there is no compulsion in religion and that the responsibility to choose the truth remains in the individual, who must be free to make their own choice with regard to faith,[940] For these reasons, "People of the Book" (Jew, Christians, and Muslims) are distinguished from idolaters, protected, and invited into common service to God.[941]

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[934] The Tanakh: Zechariah 8:20-23 and 14:16-21; Amos 3:2..

[935] *Mishnah Avot* 3:14; Midrash Rabba, Bamidbar 13:15. See *The Condition of Jewish Belief: A Symposium Compiled by the Editors of Commentary Magazine* (New York: MacMillan 1966).

[936] *Code of Maimonides, Hikkht Melakhim u 'Milhammot*, 8, 10 cited by Maoz, p. 107.

[937] Moaz, p. 107-109 citing A. Ravitzky, "Judaism Views Other Religions," *Religions View Religions: Explorations in Pursuit of Understanding*, J.D. Gort, H. Jansen & H.M. Vroom, eds. (Amsterdam-New York: Rodopi 2006), pp. 75-107.

[938] The Holy Qur'an 2:213, 2:143, 11:118,

[939] The Holy Qur'an 2:62; 5:69; as well as 49:11-13:

> "O you who believe! Let not one group of men among you deride another, for they may be better than them … So fear God – indeed, God is forgiving and merciful. O people! We have created [all of] you out of male and female, and we have made you into different nations and tribes [only] for mutual identification; [otherwise] the noblest of you in the sight of God is the one most possessed of *taqwa* [not one belonging to this or that race or nation]; God knows well and is best informed.

See , Fazlur Rahman, *Major Themes of the Qur'an* (Minneapolis, MN: Biblioteheca Islamica 1980), pp. 45, 166.

[940] The Holy Qur'an 2:256.

[941] The Holy Qur'an 2:62; 3:113; 3:65; 5:69; [Note that the Holy Qur'an distinguishes People of Book from idolaters. *See* Mustansir Mir, *Dictionary of Qur'anic Terms and Concepts* (New York:

Interactions within David Hollenbach's binary framework for religion and politics provide the basis for both religious support of the civic common good and differentiated church expression within the public political sphere of a free democratic society. The dialectical tensions between persons of conscience and their state will illuminate the issues and the potential advantages that constitutional freedoms coupled with open democratic relationships offer to both. Extension of the model from Christianity to Judaism and Islam provide widespread theological promise of increased spiritual support for diversity of citizenship and constitutionally guaranteed freedom of belief. It also underscores civic potential of a more stable democracy and a more unified civil society.

Garland Publishing, Inc. 1987), p. 104. 9:29 [poll tax]; as well as 3:64: of the Book! Let us come together upon a formula which is common between us – that we shall not serve anyone but God, that we shall associate with none but Him."

See , Fazlur Rahman, *Major Themes of the Qur'an* (Minneapolis, MN: Biblioteheca Islamica 1980), pp. 166 and 170.

Appendix II:
Case Method with Historic/Descriptive & Normative Dimensions

In a nation of immigrants, minority religious communities have faced the inherent tension between the need for unifying institutional standards and the necessity of protecting constitutionally protected human rights. The history of each minority faith's unique adaptation to the United States are both uniquely framed in their current context and instructive to the struggles of those groups which have follow them. As the official institution charged with resolving social conflict, the federal courts have played an instrumental role in helping to define the dialectical process between minority religious adaptation to American society and the social mainstream's response to their presence.[942] As the highest federal court, the U.S. Supreme Court has assumed a particularly important role in this dialectic through its decisional precedents and the principles it applies. However, the United States remains a liberal-democracy and as such, the people make the ultimate decisions regarding the norms by which they operate. Through their daily actions and behaviors, the people determine the legitimacy of Supreme Court pronouncements and the actual principles upon which American society operates.

This dissertation will examine the adaptations of Protestant denominations, Roman Catholicism, and Judaism to the American context with an eye toward furthering social understanding and easing the current transition of Muslim Americans. Although each of these minority religious groups faced unique issues and tensions, their experiences of assimilation or integration illumine the contours of developing American citizenship norms. In an attempt to fully comprehend historic group experiences, we will employ a

[942] *See* Jill Norgren and Serena Nanda, *American Cultural Pluralism and Law* (Westport, CT: Praeger Publishers, 3d ed. 2006), pp. iii-xviii.

three-step methodology. First, we will undertake a descriptive review of historic, sociological, political, and legal events. Second, we will apply with a normative lens to each case which is inquisitive of the citizenship elements in tension, representative of the social resolution reached, and sensitive to its impact upon developing American citizenship values. Finally, the citizenship model will be applied to the events surrounding each decision in an attempt to understand its normative implications for and its social impact upon the dialectical citizenship negotiations currently occurring between American Muslims and U.S. society.

Specifically, the method will entail the study of a case key to the relevant minority religious community. This descriptive examination of the case will be conducted against its historic backdrop and within its larger social context. Beginning with the faith communities' history in the United States, the background of the particular case will be set. Next, review will be made of the unique setting, parties, and facts which led to the filing and litigation of each dispute. Appealed through the federal courts, each case represents a legal issues deemed significant enough to justify repeated judicial consideration and resource expenditure. However, court cases often involve politically charged questions and socially sensitive matters that fail to be directly addressed and remain implicit in judicial decisions due to the social climate and mores of the time. For these reasons, care will then be taken to examine issues both raised and implied by the attorney briefs and oral arguments which the parties presented to the court. Subsequently, the written decisions of the courts will be similarly reviewed. Both the lower district and appellate circuit court opinions will be sifted for normative clues regarding citizenship. U.S. Supreme Court decisions will be closely scrutinized for citizenship principles

established or implied to the minority religious group. Finally, we will explore the impact of the Supreme Court's decision upon minority religious group's American adaptation and their reception as U.S. citizens by the mainstream society's acceptance.

Through this historic description of the events, we will discover how minority religious groups have helped define four normative elements foundational to the development of American citizenship: rights, duty, membership, and participation. In turn, we also will uncover the unique tensions that shaped the adaptations of each religious group toward either socially conforming assimilation or religiously defined integration with American society. This study will result in ethical reflection on how U.S. courts and American society can facilitate the transition of Muslim Americans and welcome their contributions to U.S. society. Through exploring the stories of other faith communities' American adaptations, it may help ease fears regarding faith differences, illustrate the important role of religion in the immigrant transition process, and demonstrate the valuable gifts that minority religious communities offer the U.S. Also, it is hoped that this dissertation will provide Muslim Americans with appreciation of the gifts their religious tradition offers society, evidence of their growing acceptance, and assurance that they will be accepted as full citizens of these United States. Through their social outreach and participatory efforts, Muslim Americans are helping to complete the U.S. model of citizenship development and expand the parameters of American citizenship.

Yet, it must be stressed that the development of the U.S. citizenship model and expansion of the boundaries of American citizenship is not inevitable. Never a certainty, progress in citizenship and human rights is often hard fought. Neither courts nor

legislatures are isolated institutions which autonomously make neutral laws. Even in a liberal-democracy, political leaders and economic elites may accrue a hold upon the mechanisms of governance. Likewise, the majority may dictate the terms of social inclusion. American courts must negotiate pressures from special interests, the interests of the majority, and the claims of minorities in order to make decisions the both protects diversity while preserving national unity.[943] As all federal and state courts, the U.S. Supreme Courts operates within the limits imposed by upholding its judicial integrity to constitutional rights and maintaining the legal legitimacy of its decisions.

While the American legal system rests upon a common law understanding, it would be a mistake to predict that U.S. law is engaged in inevitable progress. One has only to remember the *Dred Scott Case*[944] or the *Dow Case*[945] to be reminded that even federal courts, including the U.S. Supreme Court, have made decisions that have inhibited rather than advanced the inclusive horizons of citizenship. Both the western perception of time as linear and the common law reference to developing precedent tend to create the impression of progressive legal development. Indeed, some serious legal scholars such as Ronald Dworkin have interpreted constitutional law as "an unfolding narrative."[946]

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[943] Norgren and Serena Nanda, *American Cultural Pluralism and Law* , pp. xvii-xviii.

[944] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). In this case, the U.S. Supreme Court deced that a neither persons of African descent imported into the United States and held as slaves, nor their non-slave descendants could ever become U.S. citizens.

[945] Dow v. U.S., 226 F 145 (4. th Cir. 1915), overruling Ex Parte Dow, 211 F. 486 (E.D.S.C. 1914) and In re Dow, 213 F. 355 (E.D.S.C. 1914). In 1914, the Federal District Court in South Carolina ruled that Syrians were not eligible for U.S. citizenship because of their race. It would take a decade before this decision was effectively overturned and "Syrians" categorized as white, thus becoming eligible for American citizenship

[946] Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press 1986), p. 225. *See* Brian Bix, *Jurisprudence: Theory and Context* (Durham, N.C.: Carolina Academic Press 2004), pp. 87-89. Note that in *Law's Empire* makes this statement about all legal claims. He then applies his "unfolding narrative" theory to Constitutional law in a recorded discussion with Bill Moyer. In that interview, Dworkin tells Moyers that the Founding fathers laid down constitutional principles which they then "assigned us the rather daunting task of living up to them from our conscience. Bill Moyers, 5th Episode in 10-part TV Series," "Moyers: In Search of the Constitution," quoted by John Corry, "TV Reviews: The Constitution's

Rather, this dissertation will describe the actual U.S. historic and legal record regarding the Abrahamic minority religions. The models of citizenship developed from this study are simply descriptive of the existing case precedents. The final chapter will explore the normative implications of that unfolding for the future of Muslim Americans and U.S. citizenship norms.

All the cases examined are products of specific conditions and particular contexts. The resulting decisions are simply used to investigate how issues of minority religious liberty have influenced the development of U.S. citizenship norms. In the final analysis, these cases lead to two normative findings. First, that there are consistent elements which appear in tensions within these U.S. Supreme Court Cases involving rights of these religious minority citizens. Second, the cases beg the question of whether there may be functional and normative limits upon the nature of both national inclusion and religious accommodation.

Changing Story," NY Times (May 21, 1987) accessed at http://query.nytimes.com/gst/fullpage.html?res=9B0DE3D7123CF932A15756C0A961948260 on 4/13/08. According to Bill Bix's interpretation, Dworkin as indicating that "moral evaluation is integral to the description and understanding of law." Bill Bix, "Natural Law Theory," A Companion to the Philosophy of Law and Legal Theory, Dennis Patterson, ed. (Oxford: Blackwell Publishing, Ltd. 1999), pp. 223-240, at p. 237.

Appendix III:
Additional Pedagogical Models

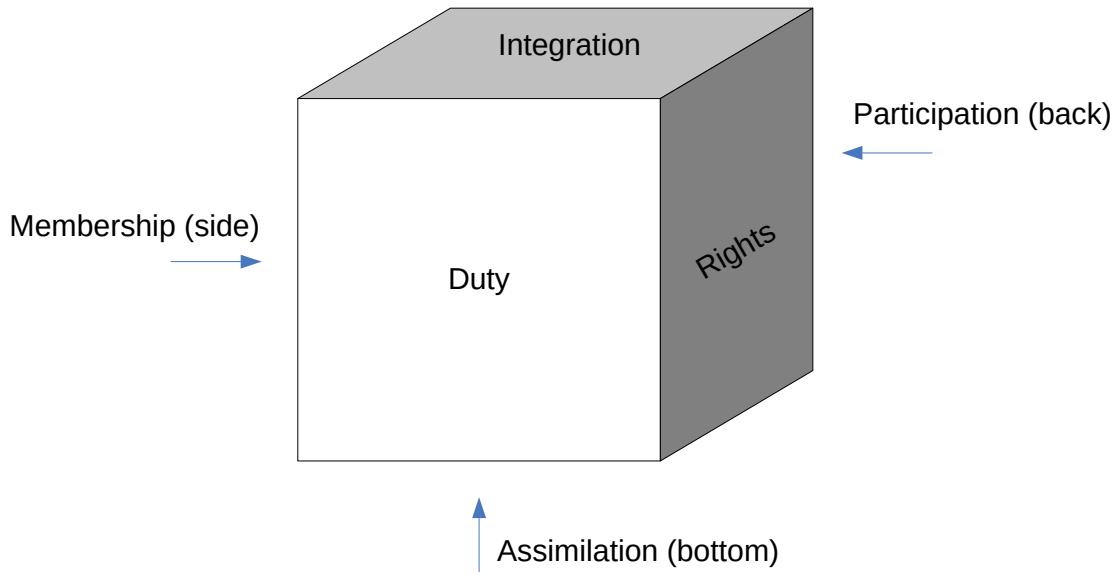
The four-dimensional model of citizenship elements was developed to aid public education concerning the development of U.S. citizenship norms. It is a representational tool that consists of a three dimensional cube with six sides. **[Figure D-1]** The four supporting sides of the cube represent the citizenship elements of rights, duties, membership, and participation. These sides rise from the base of the cube, which represents assimilation as the pervasive foundation of the American citizenship ideal. The sides rise toward the ceiling, depicting the goal of democratic citizenship as the just integration of all citizens. Such integration fully respects and appreciates civic members' attributes as both individuals and groups.

In summary, the unique combination of these elements represents the American ideal. That vision is the voluntary unity among benevolent citizens created through accepted norms rather than obligatory practices imposed by coerced or compulsive conformity. These citizens retain their distinctive attributes as they embrace and are embraced as full members of civil society. Below the boundaries of the model lie the chasm toward regimentation and totalism, while above rise the trajectory toward fragmentation and isolation. This citizenship model represents an ideal representation of both what must be achieved for full citizenship and how that notion has been developed over the course of time. This U.S. ideal has never been perfectly achieved, but the different dimensions have been engaged over time.

Each intersecting side of the cube is really a plane that extends beyond the immediate box in either direction into infinity, forming the cube through their mutual intersection.

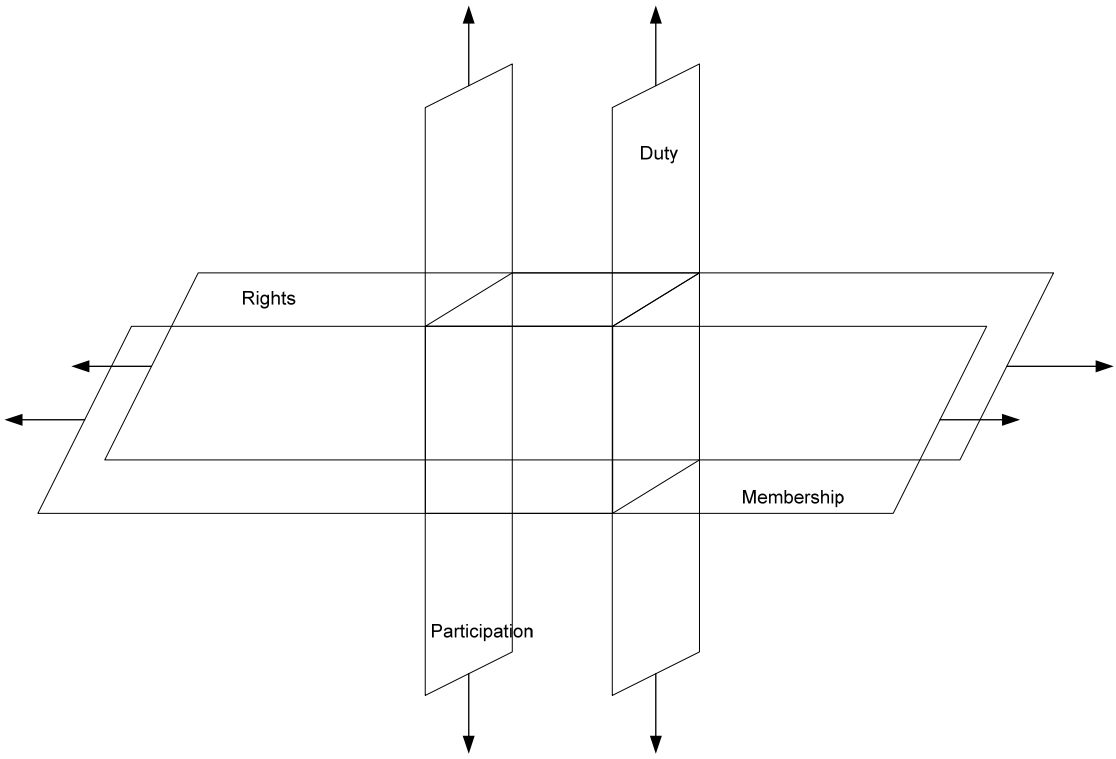
[Figure D-2] The interior of the cube represents the space which the intersecting elemental planes make available for democratic governance. When the elements depicted by these sides are in perfect balance, their intersection creates a cube. The equal sides of this square illustrate the equilibrium among the citizenship elements represented by every side. The interior thus created is the optimal environment for liberal democratic governance depicted by a sphere. **[Figure D-3]** For reasons to be explained later, the cube embraces the perfect equilibrium of justice and equality, legitimacy and stability, liberty and friendship. When the intersecting planes create an unequally sided box, the environment lacks the proper space necessary for liberal democracy. This is because it lacks the optimal proportion between citizenship elements to nurture justice and equality, legitimacy and stability, liberty and friendship.

Citizenship Cube



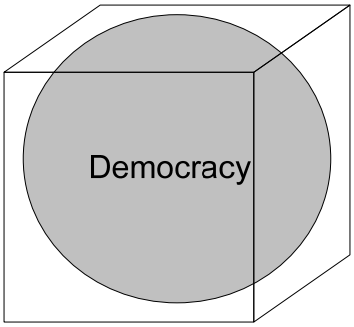
[Figure D-1]

Planes of Citizenship Cube



[Figure D-2]

Democracy Sphere
within the Citizenship Cube

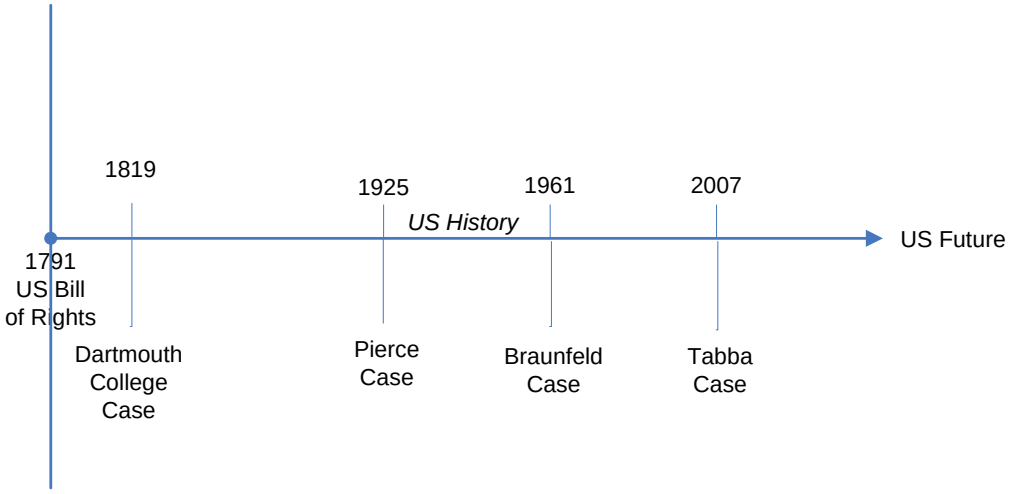


[Figure D-3]

This three dimensional, cubical citizenship model exists within the fourth dimension of time. As human beings, we perceive time as cyclical or linear. Shaped by the Western

philosophy of the Enlightenment, Americans tend to perceive time as linear and progressive.[947] For this reason, the model will show time on a horizontal axis extending from the ratification date of the U.S. Constitution's Bill of Rights outward toward the future. **[Figure D-4]** The cubical model rests atop this horizontal axis. Yet, it is not static through time. Rather, the citizenship cube rotates outward along the time continuum in an uneven movement toward the future. This has occurred as each of the four side dimensions has become the cutting edge for the evolving U.S. understanding of citizenship. **[Figure D-5]** In historic order, the element edge of American citizenship has developed from rights to duty to membership, and finally, to participation.

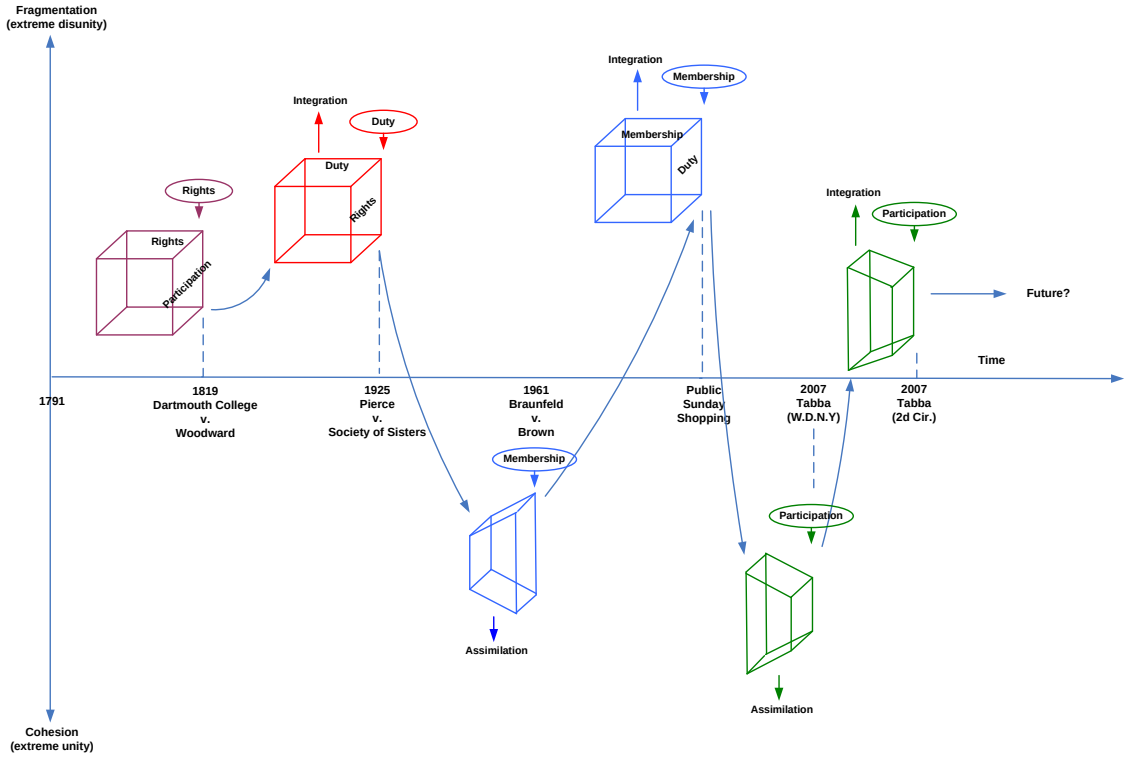
Fourth Dimension of Time



[Figure D-4]

[947] *See* (3) Fourth Dimension: The Time Continuum below; Appendix II – Case Method.

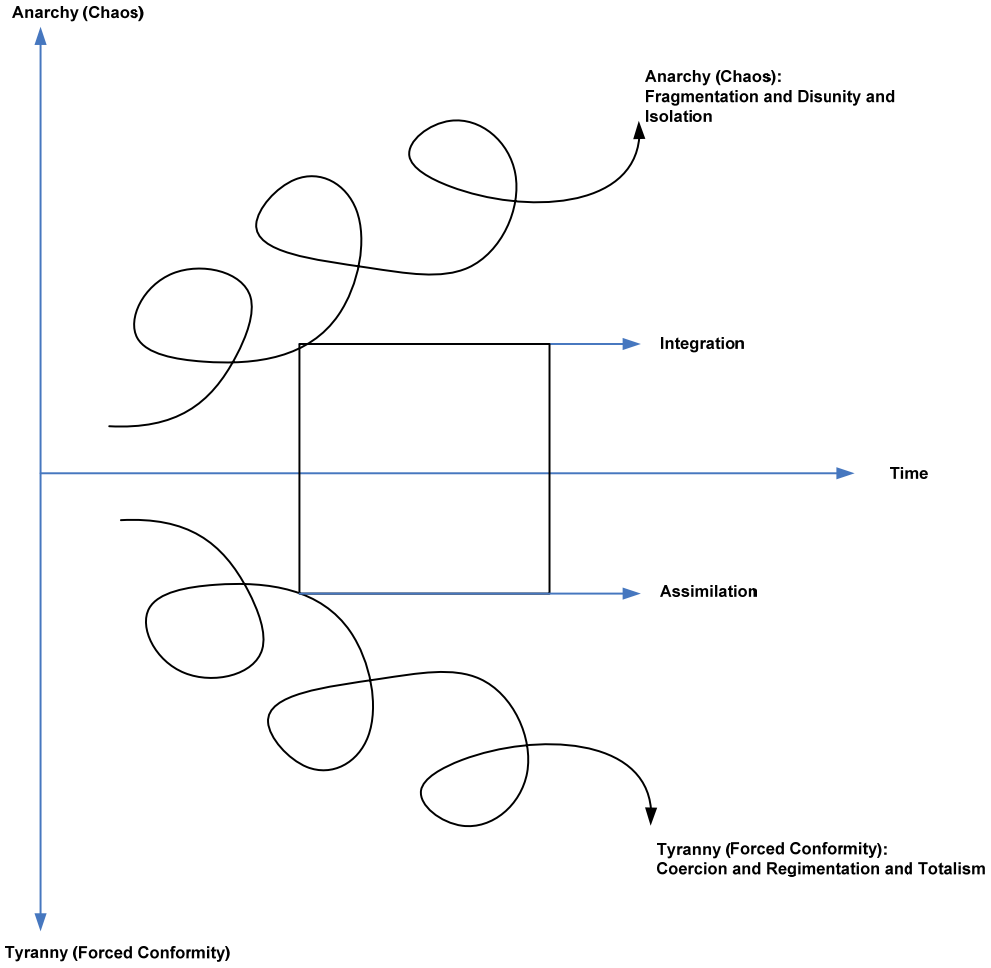
Four Dimensional Model of Citizenship Cube Within Time



[Figure D-5]

Concurrent with its movement through the unfolding of time, the cubical citizenship model moves in three other directions. First, the movement of the entire citizenship cube through time may be viewed from the side as a spiral that always spirals outward, sometimes upward and at other times downward. **[Figure D-6]** When it spirals out and up, it is moving through history toward the goal of American citizenship – full integration. At the times it moves out and down, it is spiraling downward toward the base of all citizenship – assimilation. The spiral movement of the citizenship cube is always outward because it is continually moving through history.

Spiral as Citizenship Model's Movement Through Time

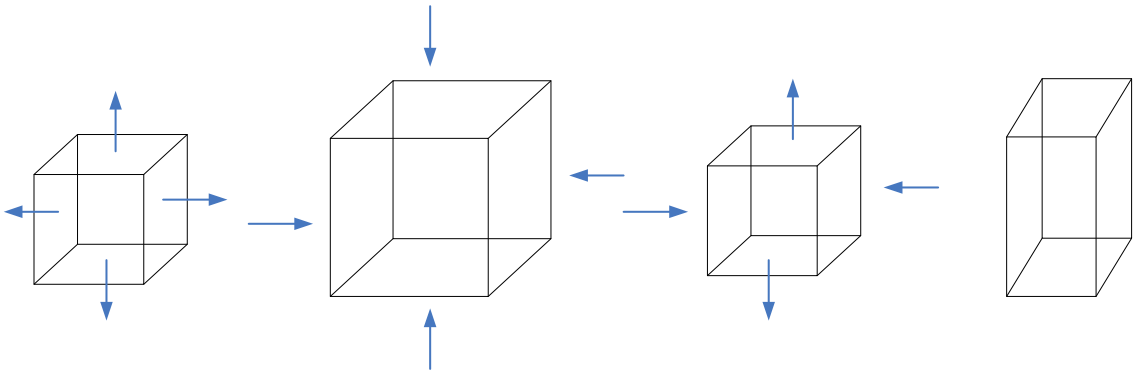


[Figure D-6]

Second, the supporting sides of the citizenship model also moves outward and inward as if breathing - the elements constituting the four laterally supporting sides expanding outward and contracting inward with the historic change in emphases upon citizenship elements. **[Figure D-7]** Third, the interior of the box alternately expands upward or downward along the four lateral sides as U.S. citizenship moves alternatively toward its goal of greater integration of diverse citizens or away for this goal toward assimilation. Movement toward integration represents successive movements toward increasing

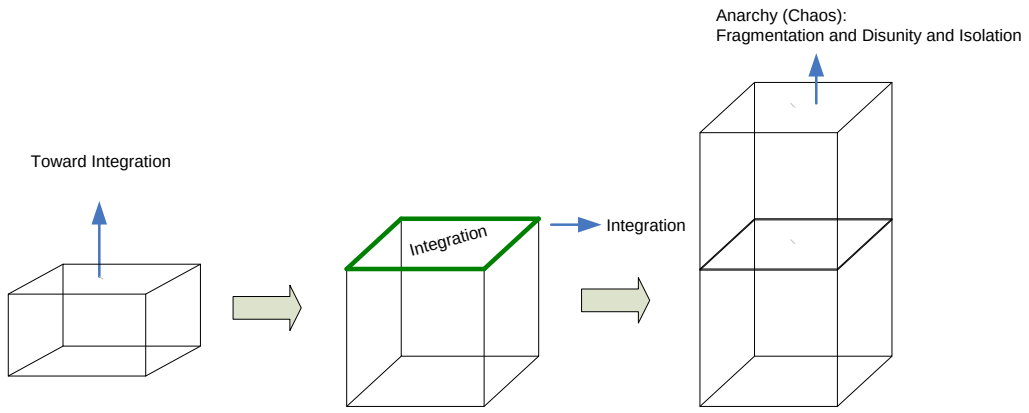
respect for citizens' individuality and thus, greater social liberty. **[Figure D-8]** Opposite regression toward assimilation represents movement toward cohesion as a citizenry group and thus, greater national unity. **[Figure D-9]** Within the box, movement of the four sides upward toward the ceiling of integration is a movement toward greater social liberty, but the sides' expansion beyond integration threatens increasing risk of social isolation and civic fragmentation. And, the shape of the cube moves beyond the balanced square of liberal democracy to imbalance. Similarly, movement of the four sides toward the cube's base of assimilation represents movement toward greater social equality, but a shift beyond the boundaries of the cube's interior threatens enforced social conformity and fusion.

Historic Change of Emphasis upon Citizenship Elements



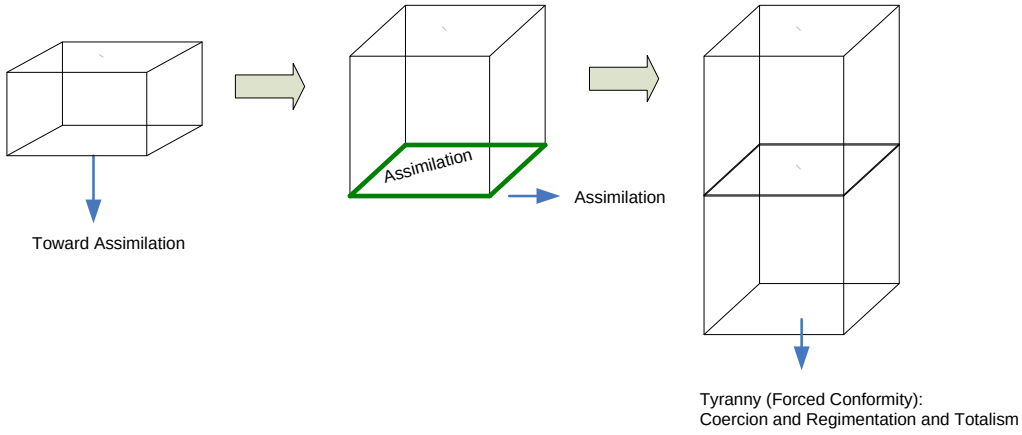
[Figure D-7]

Movement Toward Integrated Citizenship



[Figure D-8]

Movement Toward Assimilated Citizenship

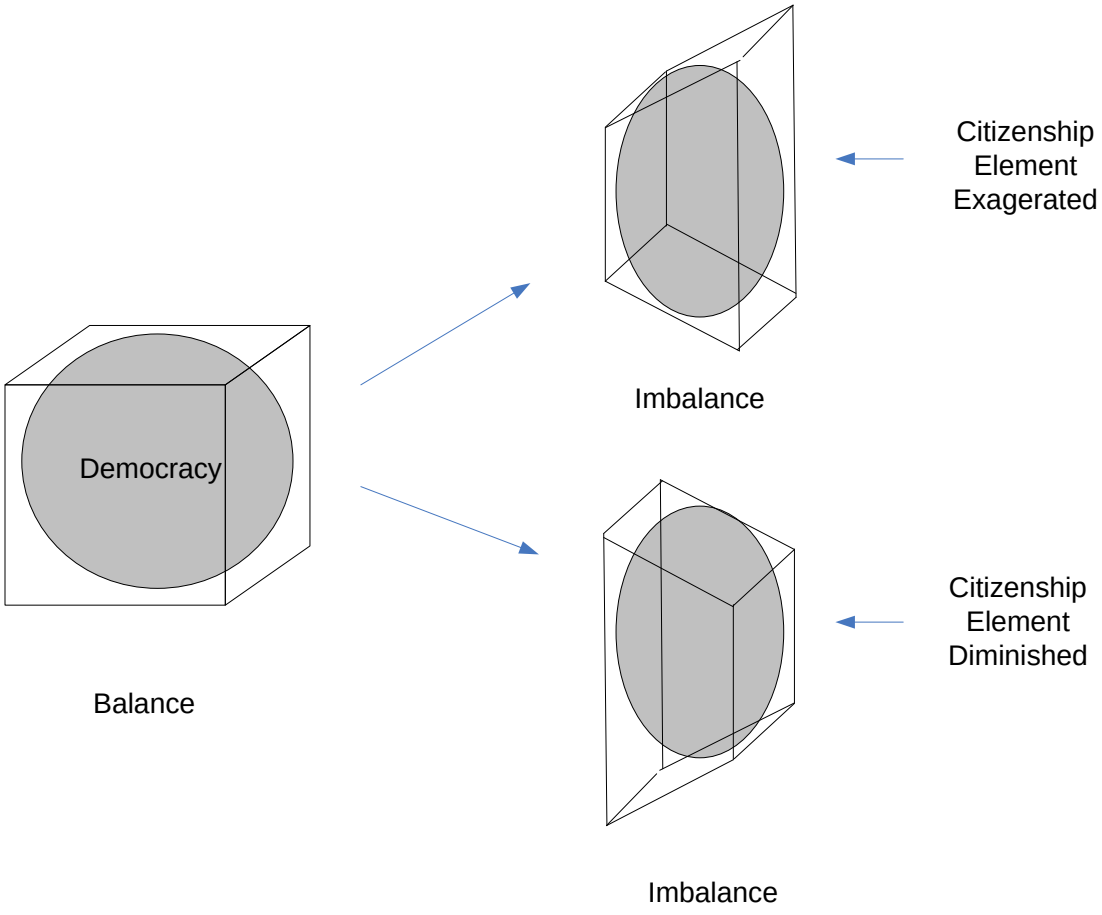


[Figure D-9]

So, the three dimensional citizenship model not only moves continually within the historic time continuum. It also regularly changes shape from cube to rectangular prism to misshapen six sided object depending upon how the planes of the six major citizenship elements are interacting at any given time. If one element of citizenship is exaggerated or diminished over the other elements, the citizenship cube is no longer in balance and

becomes a misshapen prism. This change in shape directly affects the interior space of the box which represents the available space and balance for liberal democratic governance. Again, the square cube represents the optimal shape providing the best space for just and equal, free and coherent, legitimate and stable, cohesive and integrated democracy. **[Figure D-10]**

Exaggeration or Diminishment of Any One Citizenship Element at Others' Expense Changes Citizenship Cube to Misshapen Prism
&
Diminishes Space for Democracy



[Figure D-10]

As stated earlier, further explanation of this model appears in the remaining sections of this chapter. However, here it must be noted that the four dimensional citizenship

model grows out of a close study of American citizenship norms as they have historically developed and grown through the challenges presented by ever diverse minority religious groups. It is the purpose of this dissertation not only to explore the historic interaction between religious groups and the U.S. Supreme Court which helped forge these civic norms, but also to identify the philosophic ideals that under gird their development over time.

To clearly define the citizenship model, first the four supporting sides are be presented as a two dimensional box created by the four interactive axes of rights, duties, membership, and participation. Once these axes and their interactions have been fully explored, the model is complicated into its three dimensional form, including the base of assimilation and the ceiling of integration. Then, it must be explained why all sides constitute continuous planes, intersecting to form a cube whose interior space is most conducive to liberal democracy when all sides are equilateral (forming a square). After explaining the interactions of these planes, the fourth dimension of time is described and the cubic citizenship model's existence within this larger dimension is explained. These pedagogical task of introducing the model in two, three, and four dimensional forms is accomplished in Chapter 2. In Chapter 7, these models are adapted and applied to actual federal court rulings in an effort to explain the legal challenges to citizenship posed by minority religious groups, the courts' decisions, and the normative resolutions reached by American society.

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