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THE ESSENTIAL RIGHTS AND LIBERTIES OF RELIGION IN THE AMERICAN CONSTITUTIONAL EXPERIMENT

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INTRODUCTION

Thomas Jefferson once described the religion clauses of the First Amendment to the United States Constitution as a "fair" and "novel experiment" in religious rights and liberties.[1] The religion clauses, declared Jefferson, defied the millennium-old assumptions inherited from Western Europe—that one form of Christianity must be established in a community, and that the state must protect and support it against other religions. The religion clauses, Jefferson argued, suffer neither prescriptions nor proscriptions of religion. All forms of Christianity must stand on their own feet and on an equal footing with all other religions. Their survival and growth must turn on the cogency of their word, not the coercion of the sword, on the faith of their members, not the force of the law.[2]

This bold constitutional experiment in religious liberty, though neither as fair nor as novel as Jefferson believed,[3] remains intact and in progress in the United States. The First Amendment religion clauses, drafted in 1789 and ratified in 1791,[4] remain the predominant federal con-

1 Letter from Thomas Jefferson to Six Baptist Associations Represented at Chesterfield, Va. (Nov. 21, 1808), *in* THE COMPLETE JEFFERSON, CONTAINING HIS MAJOR WRITINGS 538 (Saul K. Padover ed., 1943); *see* SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA (1963).

2 *See, e.g.*, Letter of January 23, 1808, *in* 11 THE WORKS OF THOMAS JEFFERSON 7 (Paul L. Ford ed., 1904) (arguing against state involvement in religion); Autobiography, *in* 1 THE WORKS OF THOMAS JEFFERSON 71 (Paul L. Ford ed., 1904); *see also* Thomas Jefferson, Notes for a Speech in the Virginia House of Delegates, *in* 1 THE PAPERS OF THOMAS JEFFERSON 537-39 (Julian P. Boyd ed., 1950) (arguing that the 1785 Virginia statute establishing religious freedom "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mahometan, the Hindoo, and Infidel of every denomination").

3 For examples of prototypes, see the religious liberty clauses cast in the aftermath of the Dutch Reformation in the 1570s and 1580s, collected in TEXTS CONCERNING THE REVOLT OF THE NETHERLANDS (E.H. Kossmann & A.F. Mellink trans. & eds., 1974) with discussion in O.J. DeJong, *Union and Religion*, *in* THE LOW COUNTRIES HISTORY YEARBOOK 29 (1981) and GERHARD GÜLDNER, DAS TOLERANZ-PROBLEM IN DEN NIEDERLANDEN IM AUSGANG DES 16.JAHRHUNDERTS [THE PROBLEM OF TOLERATION IN THE NETHERLANDS AT THE END OF THE SIXTEENTH CENTURY] (1968). For other European prototypes, see Karl Schwarz, *Der Begriff Exercitium Religionis Privatum, [The Concept of Private Religious Exercise]*, 105 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (KAN. AB.) 495 (1988); Brian Tierney, *Religious Rights: A Historical Perspective*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 17-46 (John Witte, Jr. & Johan D. van der Vyver eds., 1996) [hereinafter Witte & van der Vyver eds., RELIGIOUS HUMAN RIGHTS: RELIGIOUS PERSPECTIVES]. James Madison, an equally important architect of the American experiment, was aware of these Dutch prototypes. *See, e.g.*, Letter from James Madison to Rev. [Jasper] Adams (1832), *in* 9 THE WRITINGS OF JAMES MADISON 484-88 (Gaillard Hunt ed., 1910) ("Until Holland ventured on the experiment of combining a liberal toleration with the establishment of a particular creed, it was taken for granted that an exclusive & intolerant establishment was essential. . . . It remained for North America to bring the great & interesting subject to a fair, and finally to a decisive test.").

4 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

stitutional text to govern religious rights and liberties in America.[5] Principal governance of this experiment—initially left to state legislatures and state courts—has since the 1940s fallen largely to the United States Supreme Court and lower federal courts.

The American experiment in religious liberty initially inspired exuberant rhetoric throughout the young republic and beyond. Elhanan Winchester, a Baptist preacher turned Universalist, declared proudly to a London audience in 1789:

> There is but one country in the world where liberty, and especially religious liberty, is so much enjoyed as in these kingdoms, and that is the United States of America: there religious liberty is in the highest perfection. All stand there on equal ground. There are no religious establishments, no preference of one denomination of Christians above another. The constitution knows no difference between one good man, and another. A man may be chosen there to the highest civil offices, without being obliged to give any account of his faith, subscribe [to] any religious test, or go to the communion table of any church.[6]

Yale President Ezra Stiles predicted robustly in 1793:

> The United States will embosom all the religious sects or denominations in christendom. Here they may all enjoy their whole respective systems of worship and church government, complete. . . . All religious denominations will be independent of one another . . . and having, on account of religion, no superiority as to secular powers and civil immunities, they will cohabit together in harmony, and I hope, with a most generous catholicism and benevolence.[7]

Dozens of such confident endorsements of the American experiment in religious rights and liberties can be found in the sermons, pamphlets, and monographs of the young American republic.[8]

Today, the American experiment inspires far more criticism than praise. The United States does "embosom" all religious sects and denominations, as President Stiles predicted, not only from Christendom, but from around the world. American citizens do enjoy remarkable freedom of thought, conscience, and belief—too much freedom, according to some commentators.[9] But the laboratory of the United States Supreme Court, which has directed the American experiment for the past fifty years, no

5 The only other explicit constitutional provision, the prohibition against religious test oaths, U.S. CONST. art. VI, § 3, cl. 2, has been subject to only modest judicial interpretation. *See* Gerald V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987); Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83.

6 Elhanan Winchester, *A Century Sermon on the Glorious Revolution*, *in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730-1805, at 969, 988-99 (Ellis Sandoz ed., 1991) [hereinafter POLITICAL SERMONS].

7 EZRA STILES, THE UNITED STATES ELEVATED TO GLORY AND HONOR 55 (1793) (with modernized spelling and italics in original removed).

8 *See infra* notes 83-85, 159-66 and accompanying text.

9 *See, e.g.*, LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED FROM MOSES TO SALMAN RUSHDIE 568 (1993) ("We have become not only a free society, but also a numb society. We are beyond outrage."); Harold J. Berman, *Some Reflections on the Differences Between Soviet and American Concepts of Relations Between Church and State*, 5(2) CHRISTIAN LEGAL SOC'Y Q. 12

longer inspires confidence. Not only have the Court's recent decisions on the rights of religious minorities in America—particularly Jews,[10] native American Indians,[11] and Muslims[12]—evoked withering attacks in the popular and professional media. The Court's entire record on religious liberty has become vilified for its lack of consistent and coherent principles and its uncritical use of mechanical tests and empty metaphors.[13] "Religion Clause jurisprudence," writes Mary Ann Glendon,

> has been described on all sides, and even by Justices themselves, as unprincipled, incoherent, and unworkable. . . . [T]he Court must now grapple seriously with the formidable interpretive problems that were overlooked or given short shrift in the past. The task is an urgent one, for it concerns nothing less than the cultural foundations of our experiment in ordered liberty.[14]

The United States Supreme Court is not the only body that is now "grappling" with the experiment. In the past few years, the testing ground seems to be shifting away from the courts to the legislatures, and away from the federal government to the states—a trend encouraged by several recent Supreme Court opinions.[15] Congress has issued a number of acts to defend the free exercise rights of various religious individuals and groups, and in the Religious Freedom Restoration Act to define the appropriate free exercise test to be used in future cases.[16] At the same time, state legislatures and courts have become bolder in conducting their own experiments in religious liberty that seem calculated to revisit, if not rechallenge,

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(1984) ("Today it is by no means clear that the experiment [proposed by Jefferson] has succeeded.").

10 *See, e.g.*, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (state's creation of a single public school district within an exclusively Satmar Hasidic community violates establishment clause); Lee v. Weisman, 505 U.S. 577 (1992) (ecumenical prayer by a Jewish rabbi at public middle school graduation ceremony violates establishment clause); Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting free exercise claim of a military officer to wear his yarmulke on duty).

11 *See, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (denial of unemployment compensation to native American discharged for use of sacramental peyote, a proscribed narcotic, does not violate free exercise clause); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (construction of road through section of national forest regarded as sacred ground by three tribes does not violate free exercise clause); Bowen v. Roy, 476 U.S. 693 (1986) (administration's use of social security number does not violate free exercise rights of native American, who believes such use would impair his child's spirit).

12 *See, e.g.*, O'Lone v. Estate of Shabbaz, 482 U.S. 342 (1987) (denying special free exercise accommodation for Muslim prisoner to engage in collective Friday worship).

13 *See generally* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); John Witte, Jr., *The Integration of Religious Liberty*, 90 MICH. L. REV. 1363 (1992).

14 Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 (1991); *see also* Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672 (1992).

15 *See* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 237-50 (1993) (arguing that the Court has "retreated" on establishment clause cases since 1980 by its growing judicial deference to legislatures); Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 CUMB. L. REV. 247, 272-85 (1995) (suggesting that the principle of federalism, adduced in recent cases, demands greater room for such "experimentation" by the states).

16 *See, e.g.*, American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1988) (amended 1994); Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (West 1994); Military Apparel Act, 10 U.S.C. § 774 (1994); Equal Access Act, 20 U.S.C. § 4071-74 (1994); *see also* discussion *infra* notes 261-64 and accompanying text.

prevailing Supreme Court interpretations of the establishment and free exercise clauses.[17] These recent trends have served to exacerbate the indeterminacy of the American experiment.

When an experiment becomes a "kind of wandering inquiry, without any regular system of operations," wrote Francis Bacon, the "father" of the experimental method, "prudence commends three correctives."[18] First, said Bacon, we must "return to first principles and axioms," reassess them in light of our experience, and "if necessary refine them." Second, we must assess "our experience with the experiment" in light of these first principles, to determine where "the experiment should be adjusted." Third, we must "compare our experiments" and experiences with those of fellow scientists, and where we see in that comparison "superior techniques," we must "amend our experiments" and even our first principles accordingly.[19] Though Bacon offered these prudential instructions principally to correct scientific experiments that had gone awry, his instructions commend themselves to legal and political experiments as well—as he himself sought to demonstrate in seventeenth century English law and politics.[20]

This Article applies Bacon's prudential instructions to the American constitutional experiment in religious rights and liberties—an experiment that today is, indeed, "wandering, without any regular system of operations." Applying Bacon's first instruction, Part I distills from the diverse theological and political traditions and experiences of the eighteenth century the most widely embraced "first principles" of the American constitutional experiment—the "*essential rights and liberties of religion*," to use eighteenth century parlance.[21] These principles included *liberty of conscience, free exercise of religion, confessional and structural pluralism, equality of religions before the law, separation of the institutions of church and state*, and *disestablishment of religion*. Applying Bacon's second instruction, Part II analyzes the American constitutional experience in light of these first principles, lifting these principles out of the familiar free exercise and establishment clause cases of the past half century. Applying Bacon's third instruction, Part III considers the principles and practices of the American experiment against prevailing international norms of religious rights and liberties, find-

17 *See generally* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275; Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994).

18 FRANCIS BACON, *The Great Instauration*, *in* THE NEW ORGANON AND RELATED WRITINGS 7-16 (Fulton H. Anderson ed., 1960).

19 FRANCIS BACON, *Aphorisms Book One*, *in* THE NEW ORGANON AND RELATED WRITINGS, *supra* note 18, §§ 70, 82, 103, 104, at 67-69, 78-80, 97-98.

20 *See generally* Barbara Shapiro, *Sir Francis Bacon and the Mid-Seventeenth Century Movement for Law Reform*, 24 AM. J. LEGAL HIST. 331 (1980).

21 The phrase comes from a 1744 tract of Elisha Williams, a Puritan jurist and theologian, who served as rector of Yale University, military chaplain, judge of the Connecticut Supreme Court, and representative to the Connecticut General Assembly. *See* ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS: A SEASONABLE PLEA FOR THE LIBERTY OF CONSCIENCE, AND THE RIGHT OF PRIVATE JUDGMENT IN MATTERS OF RELIGION, WITHOUT ANY CONTROUL FROM HUMAN AUTHORITY (1744) [hereinafter ESSENTIAL RIGHTS AND LIBERTIES]. James Madison also spoke of "essential rights" and liberties of religion in the First Session of Congress. *See, e.g.*, 1 ANNALS OF CONGRESS 784 (Joseph Gales, Sr. ed., 1834); *see also infra* notes 87-89 and accompanying text.

ing much of the American experiment confirmed, but also finding portions of it need of refinement.

This Article is more expansionist than revisionist in inspiration and methodology. The essential rights and liberties of religion analyzed and advocated herein are not new creations. But I ground these principles in several eighteenth century sources and twentieth century international prototypes that have not been part of the conventional discussion. I also strip them of the thick accretions of recent casuistry that have obscured their essential value, vigor, and validity. The call for an integrated framework of religious liberty in America is also not new. But I warn against efforts to reduce the religion clause guarantees to one or two principles alone—even the vaunted principles in vogue today, such as neutrality, separation, equality, or accommodation. Religion is simply too vital and valuable a source of individual flourishing and social cohesion to be left to such primitive legal defenses. As both eighteenth century American writers and twentieth century international jurists have repeatedly argued, a variety of principles must be integrated into an interlocking and interdependent shield of religious liberties and rights for all. The principles of liberty of conscience, free exercise, pluralism, equality, separation, and disestablishment form the essential amalgam of any such shield.

I. THE "GENESIS" OF THE AMERICAN CONSTITUTIONAL EXPERIMENT

The religion clauses of the state constitutions and of the First Amendment, forged between 1776 and 1791, express both theological and political sentiments. They reflect both the convictions of the religious believers of the young American republic and the calculations of their political leaders. They manifest both the certitude of leading eighteenth century theologians such as Isaac Backus and John Witherspoon, and the skepticism of such contemporaneous philosophers as Thomas Jefferson and Thomas Paine. A plurality of theological and political views helped to inform the early American constitutional experiment in religious rights and liberties, and to form the so-called original intent of the constitutional framers.

The American experiment in religious rights and liberties cannot, in my view, be reduced to the First Amendment religion clauses alone, nor can the intent of the framers be determined simply by studying the cryptic record of the debates on these clauses in the First Session of Congress—however valuable that source is still today.[22] Not only are these Congressional records incomplete, but the First Amendment religion clauses, by design, reflect only a small part of the early constitutional experiment and experience. The religion clauses, on their face, define only the outer

22 For analysis of these debates in context, see *infra* notes 78-166 and accompanying text. For various interpretations, see, e.g., MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); Michael W. McConnell, *The Origins and History of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1473 (1990); Douglas Laycock, *"Non-Preferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986); Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569 (1984); Walter Berns, *Religion and the Founding Principle*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 204 (Robert H. Horwitz ed., 3d ed. 1986).

boundaries of appropriate government action respecting religion—government may not prescribe ("establish") religion nor proscribe ("prohibit") its exercise. Precisely what governmental conduct short of outright prescription or proscription of religion is constitutionally permissible is left open for debate and development. Moreover, the religion clauses on their face bind only the federal government ("Congress"), rendering prevailing state constitutional provisions, and the sentiments of their drafters, equally vital sources of original intent. Finally, the drafters of the religion clauses urged interpreters to look not to the drafters' intentions, but, in James Madison's words, "to the text itself [and] the sense attached to it by the people in their respective State Conventions, where it received all the authority which it possesses."[23] The understanding of the state conventional delegates was derived from their own state constitutional experiments and experiences, which are reflected in contemporaneous pamphlets, sermons, letters, and speeches. A wide range of eighteenth century materials must thus be consulted to come to terms with the prevailing sentiments on religious rights and liberties in the young American republic.

A. *Four Views of Religious Rights and Liberties in the Late Eighteenth Century*

Within the eighteenth century sources at hand, two pairs of theological perspectives on religious liberties and rights were critical to constitutional formation: those of congregational *Puritans* and of free church *evangelicals.* Two pairs of contemporaneous political perspectives were equally influential: those of *enlightenment* thinkers and *civic republicans.*[24] Exponents of these four perspectives often found common cause and used common language, particularly during the Constitutional Convention and ratification debates. Yet each group cast its views in a distinctive ensemble, with its own emphases and its own applications.

It must be emphasized that this is a heuristic classification, not a wooden taxonomy, of the multiple opinions on religious rights and liberties in the early republic. Other views besides these circulated, and other labels besides these were (and can be) used to describe these four views.[25]

23 Letter from James Madison to Thomas Richie (Sept. 15, 1821), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 228 (1821). For similar sentiments, see Letter from James Madison to Major Henry Lee (June 25, 1824), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 442 (1821); 5 ANNALS OF CONG. 776 (1834) (where Madison writes: "As the instrument came from [the drafter] it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through their several State conventions."). *See generally* B.N. Ong, *James Madison on Constitutional Interpretation,* 3 BENCHMARK 18 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885 (1985).

24 For other classifications of the framers' perspectives, see, e.g., ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 21-31 (1990) (distinguishing enlightenment separationists, political centrists, and pietistic separationists); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 52-86 (1993) (contrasting enlightenment, civic republican, Protestant, and common law traditions of constitutionalism); McConnell, *supra* note 22, at 1430-55 (contrasting Lockeian-Jeffersonian, various evangelical, and Madisonian views).

25 For a taxonomy of ideological and theological schools of thought, see, e.g., William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860,* 39 EMORY L.J. 65, 71-82 (1990).

Moreover, individual writers of the eighteenth century often straddled two or more perspectives, shifted their allegiances or alliances over time, or changed their tones as they moved from formal writing to the pulpit or to the political platform. John Adams, for example, expounded both Puritan and civic republican views.[26] John Witherspoon moved freely between evangelical and civic republican camps.[27] Jonathan Edwards, at least in his political and ethical writings, toed (and moved) the line between old light Puritan and new light evangelical perspectives.[28] James Madison's early writings on religious liberty had a strong evangelical flavor; his political speeches in the early sessions of Congress often pulsed with civic republican sentiments; his later writings, particularly after his Presidency, were of increasingly firm enlightenment stock.[29]

Nonetheless, exponents of these four views offered distinctive and distinguishable teachings on religious rights and liberties, and collectively had the most influence on constitutional formation. The so-called original intent of the American constitutional framers respecting government and religion cannot be reduced to any one of these views. It must be sought in the tensions among them and in the general principles that emerge from their interaction.[30] What follows is (1) a summary of each of these four views; and (2) a distillation of the general principles of religious rights and liberties that these four groups and others propagated.

1. Puritan Views

The New England Puritans were the direct heirs of the theology of religious liberty taught by European Calvinists.[31] They had revised and refined this European legacy through the efforts of John Winthrop, John Cotton, Cotton Mather, Jonathan Edwards, Charles Chauncy, Jonathan Mayhew, and a host of other eminent writers. Since the 1630s, the Puritans had dominated the New England colonies and thus had ample occasion to cast their theological and political principles into constitutional practice.[32]

The Puritans who wrote on religious liberties and rights were concerned principally with the nature of the church, of the state, and of the relationship between them.[33] They conceived of the church and the state

26 *See generally* JOHN R. HOWE, JR., THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS (1966).

27 *See generally* MARTHA LOU LEMMON STOHLMAN, JOHN WITHERSPOON: PARSON, POLITICIAN, PATRIOT (1976); JOHN WITHERSPOON, THE SELECTED WRITINGS OF JOHN WITHERSPOON (Thomas Miller ed., 1990).

28 See the notes and samples in JONATHAN EDWARDS, ETHICAL WRITINGS (Paul Ramsey ed., 1989).

29 *See* WILLIAM L. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC (1986).

30 *See* ADAMS & EMMERICH, *supra* note 24, at 21-22, 31.

31 *See* John Witte, Jr., *Moderate Religious Liberty in the Theology of John Calvin*, *in* RELIGIOUS LIBERTY IN WESTERN THOUGHT (Noel B. Reynolds & W. Cole Durham, Jr. eds., forthcoming 1996).

32 Portions of the following section are drawn from John Witte, Jr., *Blest Be the Ties that Bind: Covenant and Community in Puritan Thought*, 36 EMORY L.J. 579-601 (1987); John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41-64 (1990). For samples of Puritan writings, see THE PURITANS (Perry Miller & Thomas H. Johnson eds., 1938) and PURITAN POLITICAL IDEAS, 1558-1794 (Edmund S. Morgan ed., 1965).

33 The Puritan contribution to the American tradition of religious liberty, though generally ignored by current commentators, was well understood in the eighteenth century. *See, e.g.*, JOHN ADAMS, DISSERTATION ON THE CANON AND THE FEUDAL LAW (1765), *reprinted in* 1 PAPERS OF JOHN

as two separate covenantal associations, two seats of Godly authority in the community. Each institution, they believed, was vested with a distinct polity and calling. The church was to be governed by pastoral, pedagogical, and diaconal authorities who were called to preach the word, administer the sacraments, teach the young, care for the poor and the needy. The state was to be governed by executive, legislative, and judicial authorities who were called to enforce law, punish crime, cultivate virtue, and protect peace and order.

In the New England communities where their views prevailed, the Puritans adopted a variety of safeguards to ensure the basic separation of the institutions of church and state. Church officials were prohibited from holding political office, serving on juries, interfering in governmental affairs, endorsing political candidates, or censuring the official conduct of a statesman. Political officials, in turn, were prohibited from holding ministerial office, interfering in internal ecclesiastical government, performing sacerdotal functions of clergy, or censuring the official conduct of a cleric.[34] To permit any such officiousness on the part of church or state officials, Governor John Winthrop averred, "would confound[ ] those Jurisdictions, which Christ hath made distinct."[35]

Although church and state were not to be confounded, however, they were still to be "close and compact."[36] For, to the Puritans, these two institutions were inextricably linked in nature and in function. Each was an instrument of Godly authority. Each did its part to establish and maintain the community. As one mid-eighteenth century writer put it, "I look upon this as a little model of the Gloriou[s] Kingdome of Christ on earth. Christ Reigns among us in the Common wealth as well as in the Church, and hath his glorious Interest involved and wrapt up in the good of both Societies respectively."[37] The Puritans, therefore, readily countenanced the coordination and cooperation of church and state.

State officials provided various forms of material aid to churches and their officials. Public properties were donated to church groups for meeting houses, parsonages, day schools, and orphanages. Tax collectors collected tithes and special assessments to support the ministers and ministry of the congregational church. Tax exemptions and immunities were accorded to some of the religious, educational, and charitable organizations that they operated. Special subsidies and military protections were pro-

ADAMS 115-16 (R. Taylor et al. eds., 1977) (describing the Puritans as "apostles of religious liberty" who were the first in America "to establish a government of the church more consistent with the scriptures, and a government of the state more agreable to the dignity of humane nature"); JOSEPH PRIESTLY, AN ADDRESS TO PROTESTANT DISSENTERS OF ALL DENOMINATIONS 5-6 (1774) (arguing that "[r]eligious liberty . . . cannot be maintained except on the basis of civil liberty" and that "the Puritans and Nonconformists were equally distinguished for their noble and strenuous exertions in favour of them both").

34 *See, e.g.*, THE LAWS AND LIBERTIES OF MASSACHUSETTS 18-20 (Max Farrand ed., Harvard Univ. Press, photo. reprint 1929) (Cambridge 1648); *The Cambridge Platform, 1648*, *in* THE CREEDS AND PLATFORMS OF CONGREGATIONALISM 194, 234-37 (Williston Walker ed., 1960).

35 *Quoted in* T.H. BREEN, THE CHARACTER OF THE GOOD RULER, 1630-1730, at 42 n.24 (1970).

36 Letter from John Cotton to Lord Say and Seal (1636), *in* THE PURITANS, *supra* note 32, at 209.

37 URIAN OAKES, NEW-ENGLAND PLEADED WITH, AND PRESSED TO CONSIDER THE THINGS WHICH CONCERN HER PEACE 49 (1673).

vided for missionaries and religious outposts. Special criminal laws prohibited interference with religious properties and services. State officials also provided various forms of moral support to the church. Sabbath day laws prohibited all forms of unnecessary labor and uncouth leisure on Sundays and holy days, and required faithful attendance at worship services.

Church officials, in turn, provided various forms of material aid and accommodation to the state. Church meetinghouses and chapels were used not only to conduct religious services, but also to host town assemblies, political rallies, and public auctions, to hold educational and vocational classes, to house the community library, to maintain census rolls and birth, marriage, and death certificates. Parsonages were used not only to house the minister and his family, but also to harbor orphans and windows, the sick and the aged, victims of abuse and disaster. Church officials also afforded various forms of moral support to the state. They preached obedience to the authorities and imposed spiritual discipline on parishioners found guilty of crime.[38] They encouraged their parishioners to be active in political affairs and each year offered "election day sermons" on Christian political principles.[39] They offered learned expositions on the requirements of Godly law, and occasionally offered advice to legislatures and courts.

Puritan leaders of colonial New England left little room for individual religious experimentation. Despite their adherence to a basic separation of the institutions of church and state, the New England authorities insisted on general adherence to the creeds and canons of Puritan Calvinism. Already in the 1630s, dissidents from this faith, such as Anne Hutchinson and Roger Williams, were summarily dismissed from the colony.[40] Immigration restrictions in Massachusetts Bay throughout the seventeenth century left little room to Quakers, Catholics, Jews, "Familists, Antinomians, and other Enthusiasts."[41] Although in the eighteenth century, religious dissidents of many kinds came to be tolerated in the New England colonies, they enjoyed only limited political rights and social opportunities and were subject to a variety of special governmental restrictions, taxes, and other encumbrances.[42]

38 *See generally* EMIL OBERHOLZER, DELINQUENT SAINTS: DISCIPLINARY ACTIONS IN THE EARLY CONGREGATIONAL CHURCHES OF MASSACHUSETTS (1956); Ronald A. Bosco, *Lectures at the Pillory: The Early American Execution Sermon*, 30 AM. Q. 156 (1978) (describing the practice of New England preachers of offering lectures on the importance of moral and legal principles on the occasion of public executions).

39 *See generally* HARRY S. STOUT, THE NEW ENGLAND SOUL: PREACHING AND RELIGIOUS CULTURE IN COLONIAL NEW ENGLAND (1986); DONALD WEBER, RHETORIC AND HISTORY IN REVOLUTIONARY NEW ENGLAND (1988). See further the collection of sermons in THE PULPIT OF THE AMERICAN REVOLUTION (John W. Thornton ed., 1860), updated and expanded in POLITICAL SERMONS, *supra* note 6.

40 *See generally* THE ANTINOMIAN CONTROVERSY, 1636-1638 (David D. Hall ed., 1968); EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE (1967).

41 NATHANIEL WARD, THE SIMPLE COBLER OF AGGAWAM IN AMERICA 43 (5th ed. 1713).

42 *See generally* WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT 1630-1833 (1971).

2. Evangelical Views

Though the evangelical tradition of religious liberty is sometimes traced to the seventeenth century—particularly to Roger Williams, the founder of colonial Rhode Island[43] and William Penn, the founder of Pennsylvania[44]—it did not emerge as a strong political force until after the Great Awakening of circa 1720-1780.[45] Numerous spokesmen for the evangelical cause rose up in the course of the later eighteenth century all along the Atlantic seaboard—Isaac Backus, John Leland, John Wesley, and a host of other pastors and pamphleteers. Though the evangelicals had enjoyed fewer opportunities than the Puritans to institutionalize their views, they nonetheless had a formidable influence on the early American constitutional experiment.

Like the Puritans, the evangelicals advanced a theological theory of religious rights and liberties. They likewise advocated the institutional separation of church and state—the construction of a "wall of Separation between the Garden of the Church and the Wilderness of the world," to quote Roger Williams.[46] The evangelicals went beyond the Puritans, however, both in their definition of individual and institutional religious rights and in their agitation for a fuller separation of the institutions of church and state. The evangelicals sought to protect the liberty of conscience of every individual and the freedom of association of every religious group. Their solution was thus to prohibit all legal establishments of religion, and, indeed, all admixtures of religion and politics. As John Leland, the fiery Baptist preacher, put it in a proposed amendment to the Massachusetts Constitution:

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43 *See* THE COMPLETE WRITINGS OF ROGER WILLIAMS (1963) with analysis in EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA (1991); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455 (1991). Though he has been lionized in recent histories of religious liberty in America and was embraced by the eighteenth century Baptist leader Isaac Backus, Roger Williams was not so well known nor so well liked in later eighteenth century evangelical circles. *See, e.g.*, WALLACE COYLE, ROGER WILLIAMS: A REFERENCE GUIDE 1-7 (1977); GAUSTAD, *supra*, at 19-207, 220-21.

44 *See* A COLLECTION OF THE WORKS OF WILLIAM PENN (1726) with analysis of the contents and effect of his views in J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA (1990). Though his writings were better known to eighteenth century evangelicals than those of Williams, Penn's views on religious liberty also enjoyed only modest authority and influence. *See id.* at 10-13; James Wilson, *The Study of Law in the United States*, *in* 1 THE WORKS OF JAMES WILSON 67, 71-72 (R.G. McCloskey ed., 1967) (lamenting the habitual disregard for Penn's views among his peers).

45 On the broad range of evangelical views respecting religion and politics, church and state, and religious liberty, see THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 134-222 (1986); WILLIAM G. MCLOUGHLIN, ISAAC BACKUS AND THE AMERICAN PIETISTIC TRADITION (Oscar Handlin ed., 1967); William G. McLoughlin, *The Great Awakening as a Key to the American Revolution*, *in* PREACHERS & POLITICIANS: TWO ESSAYS ON THE ORIGINS OF THE AMERICAN REVOLUTION 1 (Jack P. Greene & William G. McLoughlin eds., 1977); MILLER, *supra* note 29. For representative evangelical writings, see ISAAC BACKUS, ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-1789 (William G. McLoughlin ed., 1968) [hereinafter BACKUS, CHURCH, STATE, AND CALVINISM]; JOHN LELAND, THE WRITINGS OF THE LATE ELDER JOHN LELAND (1845); THE GREAT AWAKENING: DOCUMENTS ILLUSTRATING THE CRISIS AND ITS CONSEQUENCES (Alan Heimart & Perry Miller eds., 1967); CHARLES F. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (repr. ed. 1971).

46 ROGER WILLIAMS, MR. COTTONS LETTER LATELY PRINTED, EXAMINED AND ANSVVERED (1644), *reprinted in* 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS, *supra* note 43, at 392.

> To prevent the evils that have heretofore been occasioned in the world by religious establishments, and to keep up the proper distinction between religion and politics, no religious test shall ever be requested as a qualification of any officer, in any department of this government; neither shall the legislature, under this constitution, ever establish any religion by law, give any one sect a preference to another, or force any man in the commonwealth to part with his property for the support of religious worship, or the maintenance of ministers of the gospel.[47]

Later, Leland put the matter even more bluntly: "The notion of a Christian commonwealth should be exploded forever."[48]

Religious voluntarism lay at the heart of the evangelical view. Every individual, they argued, must be given the liberty of conscience to choose or to change his or her faith. "[N]othing can be true religion but a voluntary obedience unto [God's] revealed will," declared the Baptist Isaac Backus.[49] State coercion or control of this choice—either directly through persecution and forced collection of tithes and services, or indirectly through withholding civil rights and benefits from religious minorities—was an offense both to the individual and to God. A plurality of religions should coexist in the community, and it was for God, not the state, to decide which of these religions should flourish and which should fade. "Religious liberty is a divine right," wrote the evangelical preacher Israel Evans, "immediately derived from the Supreme Being, without the intervention of any created authority. . . . [T]he all-wise Creator invested [no] order of men with the right of judging for their fellow-creatures in the great concerns of religion."[50]

Every religious body was likewise to be free from state control of their assembly and worship, state regulations of their property and polity, state incorporation of their society and clergy, state interference in their discipline and government. Every religious body was also to be free from state emoluments like tax exemptions, civil immunities, property donations, and other forms of state support for the church, that were readily countenanced by Puritan and other leaders. The evangelicals feared state benevolence towards religion and religious bodies almost as much as they feared state repression. For those religious bodies that received state benefits would invariably become beholden to the state, and distracted from their divine mandates. "[I]f civil Rulers go so far out of their Sphere as to take the Care and Management of *religious affairs* upon them," reads a 1776 Baptist Declaration, "Yea . . . Farewel to 'the free exercise of Religion'."[51]

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47 JACK NIPS [JOHN LELAND], THE YANKEE SPY (1794), *reprinted in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 971, 989 (Charles Hyneman & Donald S. Lutz eds., 1983).

48 LELAND, *supra* note 45, at 118; *see also* McConnell, *supra* note 22, at 1437-43.

49 Isaac Backus, Draft for a Bill of Rights for the Massachusetts Constitution (1779), *in* BACKUS, CHURCH, STATE, AND CALVINISM, *supra* note 45, at 487.

50 Israel Evans, A Sermon Delivered at Concord, Before the Hon. General Court of the State of New Hampshire at the Annual Election (1791), *in* POLITICAL SERMONS, *supra* note 6, at 1062-63.

51 Declaration of the Virginia Association of Baptists (Dec. 25, 1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 2, at 660-61.

The chief concern of the evangelicals was theological, not political. Having suffered for more than a century as a religious minority in colonial America, and even longer in Europe, they sought a constitutional means to free all religion from the fetters of the law, to relieve the church from the restrictions of the state. In so doing, they developed only the rudiments of a political theory. They were content with a state that created a climate conducive to the cultivation of a plurality of religions and accommodated all religious believers and religious bodies without conditions or controls.

3. Enlightenment Views

Exponents of the enlightenment tradition in America provided a political theory that complemented the religious rights theology of the evangelicals. Though American exponents of the enlightenment claimed early European visionaries such as John Locke and David Hume, they did not emerge as a significant political voice until the mid-eighteenth century. The American Revolution served to transform the American enlightenment tradition from scattered groups of elite philosophers into a sizeable company of intellectual and political lights. Members of this company, though widely divergent in theological perspective and social position, were united in their efforts to convert enlightenment ideals into constitutional imperatives and in their adherence to the political views of such spokesmen as Thomas Jefferson, Benjamin Franklin, and others.[52]

The primary purpose of enlightenment writers was political, not theological. They sought not only to free religion and the church from the interference of politics and the state, as did the evangelicals, but, more importantly, to free politics and the state from the intrusion of religion and the church. Exponents of the enlightenment movement taught that the state should give no special aid, support, privilege, or protection to organized religion in the form of tax exemptions, special criminal protections, administrative subsidies, or the incorporation of religious bodies. Nor should the state predicate its laws or policies on explicitly religious grounds or religious arguments, or draw on the services of religious officials or bodies to discharge state functions. As Madison put it in 1822: "[A] perfect separation between ecclesiastical and civil matters" is the best course, for "religion & Gov. will both exist in greater purity, the less they are mixed together."[53] Madison, however, did not press this logic to absolutist conclusions—particularly when it came to the "adiaphora" or nonessentials of church-state relations. In an 1832 letter to Rev. Jasper Adams, he wrote:

> [I]t may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurpation on one side or the other, or to a corrupting coalition or

52 On enlightenment views, see generally HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA (1976); THE AMERICAN ENLIGHTENMENT (Adrienne Koch ed., 1965); R. SHER, SCOTLAND AND AMERICA IN THE AGE OF THE ENLIGHTENMENT (1990); PAUL M. SPURLIN, THE FRENCH ENLIGHTENMENT IN AMERICA: ESSAYS ON THE TIMES OF THE FOUNDING FATHERS (1984).

53 Letter from James Madison to Edward Livingston (July 10, 1822), *in* 9 THE WRITINGS OF JAMES MADISON, *supra* note 3, at 102.

> alliance between them, will be best guarded against by an entire abstinence of the Gov. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect ag. trespasses on its legal rights by others.[54]

Such views were based on a profound skepticism about organized religion and a profound fear of an autocratic state. To allow church and state to be unrestricted, it was thought, would be to invite arbitrariness and abuse. To allow them to combine would be to their mutual disadvantage—to produce, in Thomas Paine's words, "a sort of mule-animal, capable only of destroying, and not of breeding up."[55] Such views were also based on the belief that a person is fundamentally an individual being and that religion is primarily a matter of private reason and conscience and only secondarily a matter of communal association and corporate confession. Every person, James Madison wrote, has the right to form a rational opinion about the duty he owes the Creator and the manner in which that duty is to be discharged.[56] Whether that religious duty is to be discharged individually or corporately is of secondary importance.[57] Such views were also based on a contractarian political philosophy that called for the state to ensure the maximum liberty of citizens and their associations and to intervene only where one party's exercise of liberty intruded on that of the other.

Post-revolutionary Virginia proved to be fertile ground for political exponents of the enlightenment tradition to cultivate these views. Article 16 of the 1776 Virginia Bill of Rights, influenced in part by James Madison, provided:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.[58]

The famous Virginia Statute on Religious Freedom, drafted by Thomas Jefferson in 1777 and ultimately passed in 1786, provided even stronger en-

54 Letter from James Madison to Rev. [Jasper] Adams, *in* 9 THE WRITINGS OF JAMES MADISON, *supra* note 3, at 484, 487. Madison's notion of a wavering "line of separation between the rights of religion and the Civil authority" that avails little in "un-essentials" is a more telling metaphor to describe the enlightenment position than the more famous Jefferson's metaphor of a high and impregnable "wall of separation between church and state." *See infra* notes 143-44 & 265-67 and accompanying text on Jefferson's wall; *see also* Sidney E. Mead, *Neither Church nor State: Reflections on James Madison's "Line of Separation"*, 10 J. CHURCH & ST. 349 (1968).

55 1 THE COMPLETE WRITINGS OF THOMAS PAINE 292 (Philip S. Foner ed., 1945).

56 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 298 (Robert A. Rutland & William M.E. Rachal eds., 1973) [hereinafter MADISON, MEMORIAL AND REMONSTRANCE].

57 In his *Detached Memoranda* (circa 1817), Madison highlights his distaste for corporate organized religions by criticizing laws that allowed ecclesiastical bodies to incorporate, to be exempt from taxation, to accumulate property, and to gain political access through legislative chaplains and other means. *See* Elizabeth Fleet, *Madison's "Detached Memoranda"*, 3 WM. & MARY Q. 553-54 (1946).

58 VA. BILL OF RIGHTS of 1776, art. XVI, *reprinted in* 1 THE PAPERS OF JAMES MADISON, *supra* note 56, at 175.

lightenment language. The statute begins by celebrating that "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion." The statute recounts the ravages of religious establishment and repression, and their resulting injuries to God, religion, churches, states, and individuals. It then guarantees: "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 opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."[59]

These lofty protections of individual religious rights went hand-in-hand with the close restrictions on corporate religious rights that were also advocated by enlightenment exponents. For example, before the turn of the nineteenth century, the Virginia legislature outlawed religious corporations (a prohibition still in place in Virginia and West Virginia).[60] It also confiscated substantial tracts of vacant glebe lands held by the Anglican church, and severely restricted the tax exemptions and immunities accorded to the remaining religious properties.[61] The law of Virginia did not live entirely by the gospel of the enlightenment, however. Even Jefferson supported the revision of Virginia's post-revolutionary laws, which included A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers; A Bill for Appointing Days of Public Fasting and Thanksgiving; and a Bill Annulling Marriages Prohibited by the Levitical Law, and Appointing the Mode of Solemnizing Lawful Marriage [in Church].[62]

4. Civic Republican Views

The "civic republicans," as they have come to be called in recent histories, were an eclectic group of politicians, preachers, and pamphleteers who strove to cultivate a set of common values and beliefs for the new nation. Their principal spokesmen were John Adams, Samuel Adams, Oliver Ellsworth, George Washington, James Wilson, and other leaders—though the movement attracted considerable support among the spiritual and intellectual laity of the young republic as well. Just as the enlightenment leaders found their theological allies among the evangelicals, so the republican leaders found their theological allies among the Puritans.[63]

59 12 THE STATUTES AT LARGE BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 84-86 (William W. Hening ed., 1823) [hereinafter VIRGINIA STATUTES].

60 *See* Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1529-33 (1973).

61 *See* H.J. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION 116 (1910).

62 2 PAPERS OF THOMAS JEFFERSON, *supra* note 2, at 555-58; ADAMS & EMMERICH, *supra* note 24, at 23-24.

63 On civic republican views, see NATHAN O. HATCH, THE SACRED CAUSE OF LIBERTY (1977); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); and the critical summary of more recent literature in Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989).

To be sure, the civic republicans shared much common ground with evangelical and enlightenment exponents. They, too, advocated liberty of conscience for all and state support for a plurality of religions in the community. They, too, opposed religious intrusions on politics that rose to the level of political theocracy and political intrusions on religion that rose to the level of religious establishment. But, contrary to evangelical and enlightenment views and consistent with Puritan views, civic republicans sought to imbue the public square with a common religious ethic and ethos—albeit one less denominationally specific and rigorous than that countenanced by the Puritans.

"Religion and Morality are the essential pillars of Civil society," George Washington declared.[64] "[W]e have no government," John Adams echoed, "armed with power capable of contending with human passions unbridled by morality and religion."[65] "Religion and liberty are the meat and the drink of the body politic," wrote Yale President Timothy Dwight.[66] According to the civic republicans, society needs a fund of religious values and beliefs, a body of civic ideas and ideals that are enforceable both through the common law and through communal suasion. This was what Benjamin Franklin had called the "Publick Religion"[67] (and what is now called the "civil religion") of America, which undergirded the plurality of sectarian religions.[68] This "Publick Religion" taught a creed of honesty, diligence, devotion, public spiritedness, patriotism, obedience, love of God, neighbor, and self, and other ethical commonplaces taught by various religious traditions at the time of the founding. Its icons were the Bible, the Declaration of Independence, the bells of liberty, and the Constitution. Its clergy were public-spirited Christian ministers and religiously devout politicians. Its liturgy was the proclamations of prayers, songs, sermons, and Thanksgiving Day offerings by statesmen and churchmen. Its policy was government appointment of legislative and military chaplains, government sponsorship of general religious education and organization, and government enforcement of a religiously based morality through positive law.[69]

Civic republicans countenanced state support and accommodation for religious institutions, for they were regarded as allies and agents of good government. "[R]eligion and its institutions are the best aid of government," declared Nathan Strong, "by strengthening the ruler's hand, and

64 Letter from George Washington to the Clergy of Different Denominations Residing In and Near the City of Philadelphia (Mar. 3, 1797), *in* 36 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, at 416 (John C. Fitzpatrick ed., 1931).

65 Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (1798), *in* 9 LIFE AND WORKS OF JOHN ADAMS 229 (1854).

66 Timothy Dwight, The Duty of Americans, at the Present Crisis, Illustrated in a Discourse, Preached on the Fourth of July, 1798 (1798), *in* POLITICAL SERMONS, *supra* note 6, at 1365, 1380.

67 BENJAMIN FRANKLIN, BENJAMIN FRANKLIN: REPRESENTATIVE SELECTIONS 203 (Chester E. Jorgenson & Frank L. Mott eds., 1932); *see* Martin E. Marty, *On a Medial Moraine: Religious Dimensions of American Constitutionalism*, 39 EMORY L.J. 9, 16-17 (1990).

68 *See* ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL (1975); SIDNEY E. MEAD, THE OLD RELIGION IN THE BRAVE NEW WORLD: REFLECTIONS ON THE RELATION BETWEEN CHRISTENDOM AND THE REPUBLIC (1977); ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING (1990).

69 *See generally* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); W. Tarver Rountree, Jr., *Constitutionalism as the American Religion: The Good Portion*, 39 EMORY L.J. 203-07 (1990).

making the subject faithful in his place, and obedient to the general laws."[70] Similarly, the Connecticut Senator Oliver Ellsworth declared: "Institutions for the promotion of good morals, are objects of legislative provision and support: and among these . . . religious institutions are eminently useful and important."[71] Civic republicans, therefore, endorsed tax exemptions for church properties and tax support for religious schools, charities, and missionaries; donations of public lands to religious organizations; and criminal protections against blasphemy, sacrilege, and interruption of religious services.[72] In theory, such state emoluments were to be given indiscriminately to all religious groups. In reality, certain Protestant groups received the preponderance of such support, while Quakers, Catholics, and the few Jewish groups about were routinely excluded.

Post-revolutionary Massachusetts proved to be fertile ground for the cultivation of these civic republican views. The 1780 Constitution of Massachusetts, for example, proclaimed that "[i]t is the *right* as well as the *duty* of all men in society, publicly and at stated seasons, to worship the SUPREME BEING, the great Creator and preserver of the universe."[73] For "the public worship of God and instructions in piety, religion, and morality, promote the happiness and prosperity of a people, and the security of a republican government."[74] The same constitution also insisted that all persons, particularly political leaders, maintain rigorous moral and religious standards: "A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government."[75]

These civic republican views also found favor in the Continental Congress, which authorized the appointment of tax-supported chaplains to the military, tax appropriations for religious schools and missionaries, diplomatic ties to the Vatican, and recitations of prayer at its opening sessions

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70 NATHAN STRONG, ELECTION SERMON 15 (1790).

71 Oliver Ellsworth, Report of the Committee to Whom Was Referred the Petition of Simeon Brown and Others . . . . (1802), *in* 11 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 371, 373 (Christopher Collier ed., 1967); *see* William Casto, *Oliver Ellsworth's Calvinism: A Biographical Essay on Religion and Political Psychology in the Early Republic*, 36 J. CHURCH & ST. 506, 525 (1994); *see also* Joseph McKeen, Sermon Preached on the Public Fast in the Commonwealth of Massachusetts 15, 17-18 (1793):

> Though some modern politicians may think religion of no importance to the state, it is clear that the experience of all ages and nations is against them. . . . The more, therefore, that the principles of piety, benevolence, and virtue are diffused among a people, the milder may their government and laws be, and the more liberty are they capable of enjoying because they govern themselves. But if there be little or no regard to religion or virtue among a people, they will not govern themselves, nor willingly submit to any laws, which lay restraint upon their passions; and consequently they must be wretched or be governed by force: they cannot bear freedom, they must be slaves.

72 *See* CHESTER J. ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 62-91 (1964); John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice*, 64 S. CAL. L. REV. 363, 368-95 (1991).

73 CONSTITUTION OR FRAME OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS OF 1780, pt. I, art. II.

74 *Id.* amend. of 1833, art. XXI (replacing pt. I, art. III in the 1780 Constitution).

75 *Id.* pt. I, art. XVIII.

and during the day of Thanksgiving.[76] The Continental Congress also passed the Northwest Ordinance in 1787, which provided, in part: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[77]

These four views—Puritan, evangelical, enlightenment, and republican—helped to inform the early American experiment in religious rights and liberties. Each view was liberally espoused by federal and state leaders in the early American republic, informally in their letters and pamphlets, and formally in the Constitutional Convention and ratification debates. Each left indelible marks in the documents and developments of early American constitutionalism.

B. The Essential Rights and Liberties of Religion

Despite the tensions among them, exponents of these four groups generally agreed upon, what New England Puritan jurist and theologian Elisha Williams called, "the essential rights and liberties of [religion]."[78] To be sure, these "essential rights and liberties" never won uniform articulation or universal assent in the young republic. But a number of enduring and interlocking principles found widespread support; many of which were included in state and federal constitutional discussions. These principles included liberty of conscience, free exercise of religion, pluralism, equality, separationism, and disestablishment of religion. Such principles remain at the heart of the American experiment today.

The common goal of these principles was to replace the inherited tradition of religious establishment with a new experiment that rendered religious rights and liberties the "first freedom" of the constitutional order. To be sure, a number of writers were reluctant to extend religious liberty to Catholics and Jews, let alone to Muslims and Indians—and these prejudices are sometimes betrayed in the earliest drafts of the state constitutions. For many eighteenth century writers, the term "religion" was synonymous with Christianity (or even Protestantism), and the discussion of "religious liberty" was often in terms of the "liberty or rights of Christians."[79] And, to be sure, some Puritans and civic republicans continued to support what John Adams called a "slender" form of congregationalist establishment in some of the New England states—consisting principally of tax collections and preferences for the congregational churches and schools.[80] But such "compromises" do not deprive the early American experiment, and the

76 *See generally* ISAAC A. CORNELISON, THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA: A STATE WITHOUT A CHURCH, BUT NOT WITHOUT A RELIGION (1895).

77 Northwest Territory Ordinance of 1787, ch. 8, art. III, 1 Stat. 50, 52 (1789).

78 ESSENTIAL RIGHTS AND LIBERTIES, *supra* note 21 *passim.*

79 Robert T. Handy, *Why it Took 150 Years for Supreme Court Church-State Cases to Escalate, in* AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 52, 54-55 (Ronald C. White & Albright G. Zimmermann eds., 1990).

80 *Quoted in* Edwin S. Gaustad, *Colonial Religion and Liberty of Conscience, in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY 23, 39 (Merrill D. Peterson & Robert C. Vaughan eds., 1988). On early nineteenth century New England patterns and practices of religious establishment, see *infra* notes 170-71 and accompanying text.

sentiments that inspired it, of their validity or ongoing utility. By eighteenth century European standards, this experiment was remarkably advanced, and calculated to benefit the vast majority of the population. Many provisions on religious rights and liberties were cast in broad terms, and those that were more denominationally specific could easily be extended to other religious groups, as later state courts repeatedly demonstrated. The "slender" New England establishments, which ended in 1833, were a far cry from the repressive, bloody regimes of the American colonies and of post-Reformation Europe. The maintenance of such soft establishments was not seen as inconsistent with guarantees of essential religious rights and liberties of all citizens within the state.[81]

Virtually all eighteenth century writers embraced religious liberty as the "first liberty" and the "first freedom."[82] It is "the most inalienable and sacred of all human rights," wrote Thomas Jefferson.[83] "Christian liberty, both civil and ecclesiastical, is the greatest blessing of the kind, that we can enjoy," wrote the congregationalist preacher Jonathan Parsons, "and therefore to be deprived of either, is the greatest injury that we can suffer."[84] At the same time, virtually all writers denounced the bloody religious establishments of previous eras. James Madison reflected commonplaces of the day when he wrote:

> [E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry, and persecution. . . . Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.[85]

1. Liberty of Conscience

Liberty of conscience was the general solvent used in the early American experiment in religious liberty. It was universally embraced in the young republic—even by the most churlish of establishmentarians.[86] The

81 The 1780 Massachusetts Constitution, part I, article II, for example, guaranteed that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience." For similar provisions, see VT. CONST. of 1793, ch. I, art. III (1796); N.H. CONST. of 1794, pt. I, arts. IV-V. When it adopted a constitution in 1818, Connecticut provided expansively: "Sec. 3. The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this state. . . . Sec. 4. No preference shall be given by law to any Christian sect or mode of worship." CONN. CONST. of 1818, art. I, §§ 3-4.

82 *See* MILLER, *supra* note 29; THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS (James E. Wood, Jr. ed., 1990).

83 Thomas Jefferson, Freedom of Religion at the University of Virginia (Oct. 7, 1822), *in* THE COMPLETE JEFFERSON, *supra* note 1, at 958.

84 JONATHAN PARSONS, FREEDOM FROM CIVIL AND ECCLESIASTICAL SLAVERY 10 (1774).

85 MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 56, para. 7 at 301, para. 11 at 302.

86 For a good collection of prevailing sentiments, see THE PALLADIUM OF CONSCIENCE, OR, THE FOUNDATION OF RELIGIOUS LIBERTY DISPLAYED, ASSERTED AND ESTABLISHED, AGREEABLE TO ITS

phrase "liberty of conscience" was often conflated with the phrase "free exercise of religion," "religious freedom," "religious liberty," "religious privileges," or "religious rights." James Madison, for example, simply rolled into one linguistic heap "religious freedom" or "the free exercise of religion according to the dictates of conscience."[87] In another passage, he spoke of "religious liberty" as the "religious rights . . . of a multiplicity of sects."[88] Such patterns of interwoven language appear regularly in later eighteenth century writings; one term often implicated and connoted several others.[89] To read the guarantee of liberty of conscience too dogmatically is to ignore the fluidity of the term in the eighteenth century.

Nonetheless, many eighteenth century writers ascribed distinctive content to the phrase. First, liberty of conscience protected *voluntarism*—"the right of private judgment in matters of religion," the unencumbered ability to choose and to change one's religious beliefs and adherences.[90] The Puritan jurist Elisha Williams put this matter very strongly for Christians in 1744 (directly contradicting the rigid opinions of his great grandfather John Cotton, a century before):

> Every man has an equal right to follow the dictates of his own conscience in the affairs of religion. Every one is under an indispensable obligation to search the Scriptures for himself . . . and to make the best use of it he can for his own information in the will of God, the nature and duties of Christianity. As every Christian is so bound; so he has an unalienable right to judge of the sense and meaning of it, and to follow his judgment wherever it leads him; even an equal right with any rulers be they civil or ecclesiastical.[91]

James Madison wrote more generically in 1785: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." The evangelical leader John Leland echoed these sentiments in 1791:

> Every man must give an account of himself to God and therefore every man ought to be at liberty to serve God in that way that he can be reconcile it to his conscience. . . . It would be sinful for a man to surrender to man which is to be kept sacred for God. A man's mind should be always open to conviction, and an honest man will receive that doctrine which

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TRUE AND GENUINE PRINCIPLES ABOVE THE BACK OF ALL PETTY TYRANTS, WHO ATTEMPT TO LORD IT OVER THE HUMAN KIND (1773) (a source frequently reprinted in the young republic).

87 VA. BILL OF RIGHTS of 1776, art. XVI.

88 *Quoted in* ANSON P. STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 61 (rev. one vol. ed. 1964).

89 *See, e.g.*, McConnell, *supra* note 22, at 1455-87. For a catalogue of such terms, see JOHN MELLEN, THE GREAT AND HAPPY DOCTRINE OF LIBERTY 17-18 (1795); AMOS ADAMS, RELIGIOUS LIBERTY AN INVALUABLE BLESSING 39-40, 45-46 (1768); A MANUAL OF RELIGIOUS LIBERTY (3d ed. 1767).

90 ESSENTIAL RIGHTS AND LIBERTIES, *supra* note 21, at 42; *see also* JOHN LATHORP, A DISCOURSE ON THE PEACE 29 (1784). The phrase "divine right of private judgment" in matters of religion was commonplace in the eighteenth century. *See, e.g.*, HUGH FISHER, THE DIVINE RIGHT OF PRIVATE JUDGMENT, SET IN A TRUE LIGHT (reprint 1790; 1731).

91 ESSENTIAL RIGHTS AND LIBERTIES, *supra* note 21, at 7-8.

> appears the best demonstrated; and what is more common for the best of men to change their minds?[92]

Puritan, enlightenment *philosophe*, and evangelical alike could agree on this core meaning of liberty of conscience.[93]

Second, and closely related, liberty of conscience prohibited religiously based *discrimination* against individuals. Persons could not be penalized for the religious choices they made, nor swayed to make certain choices because of the civil advantages attached to them. Liberty of conscience, Ezra Stiles opined, permits "no bloody tribunals, no cardinals inquisitors-general, to bend the human mind, forceably to control the understanding, and put out the light of reason, the candle of the Lord in man."[94] Liberty of conscience also prohibits more subtle forms of discrimination, prejudice, and cajolery by state, church, or even other citizens. "[N]o part of the community shall be permitted to perplex or harass the other for any supposed heresy," wrote a Massachusetts pamphleteer, ". . . each individual shall be allowed to have and enjoy, profess and maintain his own system of religion."[95]

Third, in the view of some eighteenth century writers, liberty of conscience guaranteed "a freedom and exemption from human impositions, and legal restraints, in matters of religion and conscience."[96] Persons of faith were to be "exempt[ ] from all those penal, sanguinary laws, that generate vice instead of virtue."[97] Such laws not only included the onerous criminal rules that traditionally encumbered and discriminated against religious nonconformists, and led to fines, whippings, banishments, and occasional executions of dissenting colonists. They also included more facially benign laws that worked injustice to certain religious believers—conscription laws that required religious pacificists to participate in the military, oath-swearing laws that ran afoul of the religious scruples of certain believers, tithing and taxing laws that forced believers to support churches, schools, and other causes that they found religiously odious.[98] Liberty of conscience required that persons be exempt or immune from civil duties

92 JOHN LELAND, THE RIGHTS OF CONSCIENCE INALIENABLE (1791), *reprinted in* POLITICAL SERMONS, *supra* note 6, at 1079; *see also* ISSAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY (1773), *reprinted in* POLITICAL SERMONS, *supra* note 6, at 327; Evans, *supra* note 50, at 1063.

93 This theory of "religious voluntarism," though consistently espoused by enlightenment and evangelical proponents, was a more recent importation into Puritan theology. Traditionally, Puritans and other Calvinists had emphasized the doctrines of predestination and "birthright" religion, which left less room for voluntary personal choice. For the shifts in late seventeenth and early eighteenth century Puritan thought to a voluntarist theory, see E. BROOKS HOLIFIELD, THE COVENANT SEALED: THE DEVELOPMENT OF PURITAN SACRAMENTAL THEOLOGY IN OLD AND NEW ENGLAND, 1570-1720 (1974); E. BROOKS HOLIFIELD, THE ERA OF PERSUASION: AMERICAN THOUGHT AND CULTURE, 1521-1680 (1989).

94 STILES, *supra* note 7, at 56.

95 WORCESTRIENSIS, NUMBER IV (1776), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, *supra* note 47, at 449. The typical caveat follows: "provided it does not issue in overt acts of treason against the state undermining the peace and good order of society." *Id.*

96 MELLEN, *supra* note 89, at 17 (emphasis added).

97 *Id.* at 20.

98 *See, e.g.*, PARSONS, *supra* note 84, at 7-10; BACKUS, APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY, *supra* note 92.

and restrictions that they could not, in good conscience, accept or obey.[99] As Henry Cumings put it: "Liberty of conscience requires not [only] that persons are . . . [e]xempt from hierarchical tyranny and domination, from the usurped authority of pope and prelates, and from every species of persecution on account of religion." It requires also that they "stand on equal ground, and behaving as good members of society, may equally enjoy their religious opinions, and without molestation, or being exposed to fines or to forfeitures, or any temporal disadvantages."[100]

It was commonly assumed in the eighteenth century that the laws of conscientious magistrates would not tread on the religious scruples of their subjects.[101] As George Washington put it in a letter to a group of Quakers:

> [I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.[102]

Where general laws and policies did intrude on the religious scruples of an individual or group, liberty of conscience demanded protection of religious minorities and exemption.[103] Whether such exemptions should be accorded by the legislature or by the judiciary, and whether they were per

99 HENRY CUMINGS, A SERMON PREACHED AT BILLERICA (Dec. 15, 1796) 12-13 (1797); *see also* Thomas Jefferson, Draft of Bill Exempting Dissenters from Contributing to the Support of the Church (Nov. 30, 1776), *in* 5 THE FOUNDERS' CONSTITUTION 74 (Philip Kurland & Ralph Lerner eds., 1987) (arguing that dissenters be "totally free and exempt from all Levies Taxes and Impositions whatever towards supporting and maintaining the [established Anglican] church" as a means of ensuring "equal liberty as well religious as civil" to all "good People"). These arguments for exemptions from civil impositions were sometimes extended to claiming "exemptions" and "immunities" from the jurisdiction, discipline, and confessional statements of a local church. *See, e.g.*, ISAAC FOSTER, A DEFENCE OF RELIGIOUS LIBERTY (1780) (a 192 page tract arguing for exemptions from compliance with the imposition of a new confession, the Saybrook Platform, in a local church).

100 CUMINGS, *supra* note 99, at 13.

101 *See* Carol Weisbrod, *Comment on Curry and Firmage Articles*, 7 J.L. & RELIGION 315, 320-21 (1989) (arguing for such presumptive accommodation of religious scruples, without express mention in legislation and without necessity for judicial intervention).

102 Letter to the Religious Society Called Quakers (Oct. 1789), *in* GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING: SELECTIONS FROM WASHINGTON'S LETTERS 11 (Edward F. Humphrey ed., 1932).

103 For contrary sentiments, see, e.g., MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 56, para. 4 (arguing that equality was compromised by granting certain religious groups "peculiar exemptions"). Even early writers who thought exemptions were necessary to protect religious rights and liberties were fully aware that such guarantees could be abused. Thus, on the one hand, they insisted that liberty of conscience could not be used to excuse breaches of the peace or of the public order—a caveat that found its way into almost all state constitutions. On the other hand, they insisted that liberty of conscience not be used as to support sham claims to shirk one's civil duties. In the same passage where he defends the importance of religious exemption, for example, Henry Cumings writes:

> [T]o admit the plea of conscience, when urged, in order to excuse persons from contributing, in any way, to the necessary defence, support, and well-being of the community to which they belong, would evidently be inconsistent with civil union and terminate in the abolition of society; as it would encourage people to sanctify their sordid selfishness and avarice by the sacred name, conscience, in order to free themselves from a share in the public expences [sic].

CUMINGS, *supra* note 99, at 13-14. It was thus assumed that the conscientious objector would pay for his replacement and the oath-forsaker would provide other guarantees of veracity.

se a constitutional right or simply a rule of equity—the principal bones of contention among recent commentators[104]—the eighteenth century sources at my disposal simply do not clearly say.

All the early state constitutions include a guarantee of liberty of conscience for all.[105] The Delaware Constitution provides typical language:

> That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any religious ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul [sic] the right of conscience and free exercise of religious worship.[106]

The Pennsylvania Constitution adds a protection against religious discrimination: "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship." It also provides an exemption for conscientious objectors: "Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent."[107] The Constitution of New York addressed both state and church intrusions on conscience, and endeavored

> not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind [and thus] declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind.[108]

The Constitution of New Jersey provided exemptions from religious taxes, using typical language: "nor shall any person . . . ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church . . . or ministry, contrary to what he believes to be right."[109]

The principle of liberty of conscience also informed some of the federal constitutional debates on religion. Article VI of the Constitution explicitly provides: "[N]o religious Test [oath] shall ever be required as a

104 *See* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367 (1994); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

105 For good summaries of these state developments, see CHESTER ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS (1965); John K. Wilson, *Religion Under the State Constitutions, 1776-1800*, 32 J. CHURCH & ST. 753 (1990).

106 DEL. DECLARATION OF RIGHTS of 1776, § 2.

107 PA. CONST. of 1776, art. II, art. VIII.

108 N.Y. CONST. of 1777, art. XXXVIII.

109 N.J. CONST. of 1776, art. XVIII.

Qualification" for public office, thereby, *inter alia*, protecting the religiously scrupulous against oath-swearing.[110] Early versions of the First Amendment religion clauses included such phrases as: "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead";[111] "The civil rights of none shall be abridged on account of religious belief or worship . . . nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed";[112] "Congress shall make no law . . . to infringe the rights of conscience."[113] Such phrases were ultimately abandoned (though not argued against in the extant records[114]) for the more pregnant language: "Congress shall make no law . . . prohibiting the free exercise [of religion]." This language does not leave conscience unprotected, but more protected. Since Congress cannot "prohibit" the free exercise, the public manifestation, of religion, a fortiori Congress cannot "prohibit" a person's private liberty of conscience, and the precepts embraced therein.

Liberty of conscience was the cardinal principle for the new experiment in religious liberty. Several other "essential rights and liberties of religion" built directly on this core principle.

2. Free Exercise

Liberty of conscience was inextricably linked to free exercise of religion. Liberty of conscience was a guarantee to be left alone to choose, to entertain, and to change one's religious beliefs. Free exercise of religion was the right to act publicly on the choices of conscience once made, without intruding on or obstructing the rights of others or the general peace of the community. Already in 1670, the Quaker leader William Penn had linked these two guarantees, insisting that religious liberty entails "not only a mere liberty of the mind, in believing or disbelieving . . . but [also] the exercise of ourselves in a visible way of worship."[115] By the next century, this organic linkage was commonly accepted. Religion, Madison wrote, "must be left to the convictions and conscience of every man; and it is the right of every man to exercise it as these may dictate."[116] For most eight-

110 *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 703 (1833); ADAMS & EMMERICH, *supra* note 24, at 61-62.

111 Virginia Version (June 27, 1788), *in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 380 (1894).

112 James Madison's First Proposal, introduced in the House on June 7, 1789, *in* 1 ANNALS OF CONGRESS, *supra* note 21, at 434.

113 Draft proposed by Fisher Ames of Massachusetts on August 20, 1789 for debate in the House, *in* 1 ANNALS OF CONGRESS, *supra* note 21, at 766.

114 Indeed the prevailing assumption in the House Debates of August 15, 1789 about the religion clauses was, in Representative Carroll's words, that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand" and that "many sects have concurred in [the] opinion that they are not well secured under the present Constitution," lacking a bill of rights. *Id.* at 730.

115 WILLIAM PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE (1670), *reprinted in* 1 A COLLECTION OF THE WORKS OF WILLIAM PENN, *supra* note 44, at 443, 447.

116 MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 56, para. 1; *see also* LEVI HART, LIBERTY DESCRIBED AND RECOMMENDED 14-15 (1775) (distinguishing religious liberty, ecclesiastical liberty, and spiritual liberty).

eenth century writers, religious belief and religious action went hand-in-hand, and each deserved legal protection.[117]

Though eighteenth century writers, or dictionaries, offered no universal definition of "free exercise," the phrase generally connoted various forms of free public religious action—religious speech, religious worship, religious assembly, religious publication, religious education, among others.[118] Free exercise of religion also embraced the right of the individual to join with like-minded believers in religious societies, which religious societies were free to devise their own modes of worship, articles of faith, standards of discipline, and patterns of ritual.[119] Eighteenth century writers did not speak unequivocally of what we now call group rights, or corporate free exercise rights, but they did regularly call for "ecclesiastical liberty," "the equal liberty of one sect . . . with another," and the right "to have the full enjoyment and free exercise of those spiritual powers . . . which, being derived only from CHRIST and His Apostles, are to be maintained, independent of every foreign, or other, jurisdiction, so far as may be consistent with the civil rights of society."[120]

Virtually all of the early state constitutions guaranteed "free exercise" rights—adding the familiar caveat that such exercise not violate the public peace or the private rights of others. Most states limited their guarantee to "the free exercise of religious worship" or the "free exercise of religious profession"—thereby leaving the protection of other noncultic forms of religious expression and action to other constitutional guarantees. A few states provided more generic free exercise guarantees. Virginia, for example, guaranteed "the free exercise of religion, according to the dictates of conscience"[121]—expanding constitutional protection to cultic and noncultic religious expression and action, provided it was mandated by conscience. The Georgia constitution provided even more flatly: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State."[122] The First Amendment drafters chose equally embracive language of "the free exercise" of religion. Rather than using the categorical language preferred by state drafters, however, the First Amendment drafters guaranteed protection only against Congressional laws "prohibiting" the free exercise of religion. Whether Congress could make laws "infringing" or "abridging" the free exercise of religion—as earlier drafts sought to outlaw—was left open to subsequent interpretation.

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117 *Cf. infra* notes 183-87, 202 & 334 and accompanying text (discussing the belief versus act dualism).

118 For contemporaneous European understandings of the phrase, which were known to some eighteenth century American writers, see SCHWARZ, *supra* note 3.

119 *See, e.g.*, ESSENTIAL RIGHTS AND LIBERTIES, *supra* note 21, at 46-65; BACKUS, CHURCH, STATE, AND CALVINISM, *supra* note 45, at 345-65; PARSONS, *supra* note 84, at 14-15; STILES, *supra* note 7, at 55-99; ADAMS, *supra* note 89, at 38-46.

120 *See* HART, *supra* note 116, at 14; BACKUS, CHURCH, STATE, AND CALVINISM, *supra* note 45, at 348-49; A DECLARATION OF CERTAIN FUNDAMENTAL RIGHTS AND LIBERTIES OF THE PROTESTANT EPISCOPAL CHURCH IN MARYLAND, *quoted in* 1 ANSON P. STOKES, CHURCH AND STATE IN THE UNITED STATES 741 (1950).

121 VA. CONST. of 1776, § 16.

122 GA. CONST. of 1777, art. LVI.

3. Pluralism

Eighteenth century writers regarded "multiplicity," "diversity," or "plurality," as an equally essential dimension of religious rights and liberties. Two kinds of pluralism were distinguished.

Evangelical and enlightenment writers urged the protection of *confessional pluralism*—the maintenance and accommodation of a plurality of forms of religious expression and organization in the community. Evangelical writers advanced a theological argument for this principle, emphasizing that it was for God, not the state, to decide which forms of religion should flourish and which should fade. "God always claimed it as his sole prerogative to determine by his own laws what his worship shall be, who shall minister in it, and how they shall be supported," Isaac Backus wrote.[123] "God's truth is great, and in the end He will allow it to prevail."[124] Confessional pluralism served to respect and reflect this divine prerogative. Enlightenment writers advanced a rational argument. "Difference of opinion is advantageous in religion," Thomas Jefferson wrote:

> The several sects perform the office of a *Censor morum* over each other. Is uniformity attainable? Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity. . . . Reason and persuasion are the only practicable instruments.[125]

Madison wrote similarly that "the utmost freedom . . . arises from that multiplicity of sects which pervades America, . . . for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest."[126] Other writers added that the maintenance of multi-

123 BACKUS, CHURCH, STATE, AND CALVINISM, *supra* note 45, at 317; *see also, e.g.*, THE FREEMAN'S REMONSTRANCE AGAINST AN ECCLESIASTICAL ESTABLISHMENT 13 (1777).

124 ISAAC BACKUS, TRUTH IS GREAT AND WILL PREVAIL 3 (1781). For comparable sentiments, see JOHN R. BOLLES, A BRIEF ACCOUNT OF PERSECUTIONS, IN BOSTON AND CONNECTICUT GOVERNMENTS 47, 59 (1758). George Washington also expressed comparable sentiments to Roman Catholics, Quakers, Jews, and other religious minorities in the young republic. *See, e.g.*, Letter to the Hebrew Congregation of the City of Savannah (May 1790), *in* GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING, *supra* note 102, at 12:

> May the same wonder-working Deity, who long since delivered the Hebrews from their Egyptian oppressers, and planted them in the promised land . . . still continue to water them with the dews of Heaven, and to make the inhabitants of every denomination participate in the temporal and spiritual blessings of that people, whose God is Jehovah.

125 THOMAS JEFFERSON, *Notes on the State of Virginia, Query 17*, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 99, at 79, 80; *see also* STILES, *supra* note 7, at 55-56; THOMAS PAINE, COMMON SENSE (1776), *reprinted in* THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE 4 (Philip S. Foner ed., 1945).

126 James Madison, Debates (June 12, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (Jonathan Elliot ed., 2d ed. 1836); *see* Smith, *supra* note 22, at 576-79; Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 373 (1995); *see also* Letter from Benjamin Rush to John Armstrong (Mar. 19, 1783), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 99, at 78.

> Religion is best supported under the patronage of particular societies. . . . Religion could not long be maintained in the world without forms and the distinctions of sects. The weaknesses of human nature require them. The distinction of sects is as necessary . . . towards the perfection and government of the whole as regiments and brigades are in an army.

ple faiths is the best protection of the core guarantee of liberty of conscience.[127]

Puritan and civic republican writers insisted as well on the protection of *social pluralism*—the maintenance and accommodation of a plurality of associations to foster religion. Churches and synagogues were not the only "religious societies" that deserved constitutional protection. Families, schools, charities, and other learned and civic societies were equally vital bastions of religion and equally deserving of the special protections of religious rights and liberties. These diverse social institutions had several redeeming qualities. They provided multiple forums for religious expressions and actions, important bulwarks against state encroachment on natural liberties, particularly religious liberties, and vital sources of theology, morality, charity, and discipline in the state and broader community.[128] As John Adams put it:

> My Opinion of the Duties of Religion and Morality comprehends a very extensive connection with society at large. . . . The Benevolence, Charity, Capacity and Industry which exerted in private Life, would make a family, a Parish or a Town Happy, employed upon a larger Scale, in Support of the great Principles of Virtue and Freedom of political Regulations might secure whole Nations and Generations from Misery, Want and Contempt.[129]

Pluralism was thus not just a sociological fact for several eighteenth century writers; it was a constitutional condition for the guarantee of true religious rights and liberties. This was a species and application of Madison's argument about pluralism in *Federalist Paper No. 10*—that the best protection against political tyranny is the guarantee of a multiplicity of interests, each contending for public endorsement and political expression in a federalist republic.[130]

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127 *See* ESSENTIAL RIGHTS AND LIBERTIES, *supra* note 21, at 40-42; STILES, *supra* note 7, at 55.

128 *See, e.g.*, 1 THE WORKS OF JAMES WILSON, *supra* note 44, at 197. *See generally* WILSON C. MCWILLIAMS, THE IDEA OF FRATERNITY IN AMERICA 112-23 (1973); CLINTON L. ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 204 (1963). For earlier pluralist theories rooted in the work of the sixteenth century Dutch political theorist Johannes Althusius and in Puritan covenant theology, see respectively CARL J. FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE 11-25 (1968), and Witte, *supra* note 32, at 581-82.

129 Letter from John Adams to Abigail Adams (Oct. 29, 1775), *quoted in* HOWE, *supra* note 26, at 156-57.

130 *See* THE FEDERALIST No. 10 (James Madison) (Clinton Rossiter ed., 1961) (where Madison foreshadowed this argument about the virtues of religious pluralism). In a pure democracy, he warned that "[a] zeal for different opinions concerning religion, concerning government, and many other points" may lead persons to "mutual animosity," and render them "much more disposed to vex and oppress each other than to co-operate for the common good." *Id.* at 79. In a federalist republic, however,

> [t]he influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.

Id. at 84; *see also* ADAMS & EMMERICH, *supra* note 24, at 43-51 (regarding the linkage of pluralism and federalism); Glendon & Yanes, *supra* note 14, at 537-39 (arguing for a "structural approach" to the religion clause that takes fuller account of the role of institutional and associational dimensions of religion in a democratic society); *cf.* Mark Tushnet, *The Emerging Principle of Accommoda-*

4. Equality

The efficacy of liberty of conscience, free exercise of religion, and confessional pluralism depended on a guarantee of equality of all peaceable religions before the law. For the state to single out one pious person or one form of faith for either preferential benefits or discriminatory burdens would skew the choice of conscience, encumber the exercise of religion, and upset the natural plurality of faiths. Many eighteenth century writers therefore inveighed against the state's unequal treatment of religion. Madison captured the prevailing sentiment: "A just Government . . . will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."[131]

This principle of equality of all peaceable religious persons and bodies before the law found its way into a number of early state constitutions. The Constitution of New Jersey insisted that "there shall be no establishment of any one religious sect in . . . preference to another."[132] Delaware guaranteed Christians "equal rights and privileges"—a guarantee soon extended to all religions.[133] Maryland insisted that Christians "are equally entitled to protection in their religious liberty."[134] Virginia guaranteed that "all men are equally entitled to the free exercise of religion."[135] New York guaranteed all persons "free exercise and enjoyment of religious profession and worship, without discrimination or preference."[136] Even Massachusetts, which maintained a "slender" establishment, nonetheless guaranteed that "all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the pro-

tion of Religion (Dubitante), 76 GEO. L.J. 1691, 1695-97 (1988) (warning of the dangers of majoritarianism even where Madison's views of political and religious pluralism are respected).

131 MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 56, para. 8; *see also id.* para. 4 (arguing that the general assessment bill in Virginia "violates equality by subjecting some to peculiar burdens [and] by granting others peculiar exemptions"); Paul J. Weber, *James Madison and Religious Equality*, 44 REV. POL. 163 (1982). For comparable sentiments, see, e.g., THE FREEMAN'S REMONSTRANCE, *supra* note 123, at 5, 10-13 (arguing that "every society of Christians [should be] allowed full, equal, and impartial liberty," and that it is contrary to "scripture, reason, and experience [that] one society of Christians should be raised to domination over all the rest").

Though the principal concern of eighteenth century writers was to protect equality of religions before the law, this principle was also on occasion designed to protect nonreligious persons, particularly in furnishing financial support for religious causes. Thus, for example, in protesting the general assessments in Virginia, Madison wrote:

> Above all are they to be considered as retaining an "*equal* title to the free exercise of Religion according to the dictates of Conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man.

MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 56, para. 4 (emphasis added and footnote omitted).

132 N.J. CONST. of 1776, art. XIX.

133 Declaration of Rights and Fundamental Rules of the Delaware Senate, § 3 and amend. (1776).

134 MD. CONST. of 1776, § XXXIII.

135 VA. CONST. of 1776, § 16.

136 N.Y. CONST. of 1777, art. XXXVIII.

tection of the law; and no subordination of any one sect or denomination to another shall ever be established by law."[137]

The principle of equality also found its place in early drafts of the First Amendment religion clauses, yielding such phrases as: "nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed";[138] "Congress shall make no law establishing one religious sect or society in preference to others. . . .";[139] and "Congress shall make no law establishing any particular denomination of religion in preference to another. . . ."[140] Madison, in fact, regarded protection of the "equal rights of conscience" as the "most valuable" guarantee for religious liberty, and he argued that it should be universally guaranteed at both the federal and state levels.[141] These provisions and arguments were abandoned for the more generic guarantees of disestablishment and free exercise at the federal level—guarantees which presumably are to apply equally to all religions.

5. Separationism

The principle of separationism was designed primarily to protect religious bodies and religious believers in their inherent rights.

On the one hand, separationism guaranteed the independence and integrity of the internal processes of religious bodies. Elisha Williams spoke for many churchmen when he wrote: "*[E]very church* has [the] *Right* to *judge* in *what manner* God is to be *worshipped* by them, and *what Form of Discipline* ought to be observed by them, and the *Right* also of *electing their own Officers.*"[142] In the mind of most eighteenth century writers, the principle of separation of church and state mandated neither the separation of religion and politics nor the secularization of civil society. No eighteenth century writer would countenance the preclusion of religion altogether from the public square or the political process. The principle of separationism was directed to the institutions of church and state, not to religion and culture.

On the other hand, the principle of separationism also protected the liberty of conscience of the religious believer. President Thomas Jefferson, for example, in his famous 1802 Letter to the Danbury Baptist Association,

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137 MASS. CONST. of 1780, amend. XI. Originally, the guarantee applied only to "every denomination of Christians." *Id.* art III.

138 James Madison's First Proposal (June 8, 1789), *in* 1 ANNALS OF CONGRESS, *supra* note 21, at 434.

139 Version first rejected by the Senate, then reconsidered and passed by the Senate, on September 3, 1789. 1 JOURNAL OF THE FIRST SESSION OF THE SENATE 70 (1802).

140 This version was rejected by the Senate on September 3, 1789. *Id.*

141 Argument made in support of Amendment to Article I, section 10 in 1 ANNALS OF CONGRESS, *supra* note 21, at 783-84. Madison argued: "If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments." *Id.* His initial proposed amendment to Congress of June 8, 1789 sought to make the protection of equality and liberty of conscience universal, and the disestablishment guarantee binding on the federal government alone: "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." *Id.* at 434.

142 ESSENTIAL RIGHTS AND LIBERTIES, *supra* note 21, at 46.

tied the principle of separationism directly to the principle of liberty of conscience:

> Believing with you that *religion is a matter which lies solely between man and his God*, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," *thus building a wall of separation between church and State.* Adhering to this expression of the supreme will of the nation *in behalf of the rights of conscience*, I shall see with sincere satisfaction the progress of those sentiments which tend *to restore to man all his natural rights*, convinced he has no natural right in opposition to his social duties.[143]

Separatism thus assured individuals of their natural, inalienable right of conscience, which could be exercised freely and fully to the point of breaching the peace or shirking social duties. Jefferson is not talking here of separating politics and religion. Indeed, in the very next paragraph of his letter, President Jefferson performed an avowedly religious act of offering prayers on behalf of his Baptist correspondents: "I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man. . . ."[144]

The principles of pluralism, equality, and separationism—separately and together—served to protect religious bodies, both from each other and from the state. It was an open question, however, whether such principles precluded governmental financial and other forms of support of religion altogether. Evangelical and enlightenment writers sometimes viewed such principles as a firm bar on state support, particularly financial support, of religious beliefs, believers, and bodies.[145] James Madison, for example, wrote late in his life:

> Every new & successful example . . . of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that religion & Govt. will both exist in greater purity, the less they are mixed together.[146]

143 Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 113 (H.A. Washington ed., 1854) (emphasis added).

144 *Id.* at 114. Jefferson's use of the phrase "wall of separation between church and state" in a letter to *Baptists* might well have been simply an attempt to use an ingratiating metaphor first expressed in America by Roger Williams and well known in Baptist and other Free Church circles of the day. *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND THE GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 1-3 (1965). So far as I know, the phrase appears nowhere else in Jefferson's writings. A more apt phrase to capture this concept of separationism might well be Madison's "wavering line of separation between the rights of religion and Civil government." *See supra* note 54 and accompanying text.

145 *See, e.g.*, Laycock, *supra* note 22; LEO PFEFFER, CHURCH, STATE, AND FREEDOM (rev. ed. 1967); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986).

146 Letter from James Madison to Edward Livingston (July 10, 1822), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 99, at 105-06; *see also* MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 56, para. 9 ("Distant as it may be in its present form from the Inquisition, it [the general

Similar sentiments can be found in contemporaneous Baptist tracts, particularly those of Isaac Backus and John Leland.[147] Puritan and republican writers often viewed such principles only as a prohibition against direct financial support for the religious worship or exercise of one particular religious group. General governmental support for religion—in the form of tax exemptions to religious properties, land grants and tax subsidies to religious schools and charities, tax appropriations for missionaries and military chaplains, and similar general causes—were considered not only licit, but necessary for good governance.[148]

6. Disestablishment

For some eighteenth century writers, particularly the New England Puritans who defended their "slender establishments," the roll of "essential rights and liberties" ended here. For other writers, however, the best protection of all these principles was through the explicit disestablishment of religion. The term "establishment of religion" was a decidedly ambiguous phrase—in the eighteenth century, as much as today. The phrase was variously used to describe compromises of the principles of separationism, pluralism, equality, free exercise, and/or liberty of conscience. The guarantee of "disestablishment of religion" could signify protection against any such compromise.

According to some eighteenth century writers, the guarantee of disestablishment protected separationism. In Jefferson's words, it prohibited government

> from intermeddling with religious institutions, their doctrines, discipline, or exercises. . . . [and from] the power of effecting any uniformity of time or matter among them. Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own peculiar tenets. . . .[149]

This view of disestablishment of religion was posed in the penultimate draft of the establishment clause: "Congress shall make no law establishing articles of faith or a mode of worship . . . ."[150]—a provision rejected for a mere generic guarantee.

For other eighteenth century writers, the guarantee of disestablishment protected the principles of equality and pluralism by preventing government from singling out certain religious beliefs and bodies for preferential treatment. This concept of disestablishment came through re-

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assessment for religion] differs from it only in degree. The one is the first step, the other the last step in the career of intolerance.").

147 *See, e.g.*, THE FREEMAN'S REMONSTRANCE, *supra* note 123, at 5-11; ISAAC BACKUS, THE INFINITE IMPORTANCE OF THE OBEDIENCE OF FAITH, AND OF A SEPARATION FROM THE WORLD, OPENED AND DEMONSTRATED 15-31 (2d ed. 1791); ISAAC BACKUS, POLICY AS WELL AS HONESTY FORBIDS THE USE OF SECULAR FORCE IN RELIGIOUS AFFAIRS (1779).

148 *See* sources cited *supra* notes 37-39 & 68-72.

149 Letter from Thomas Jefferson to Rev. Samuel Miller (1808), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 428-29 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

150 1 JOURNAL OF SENATE, *supra* note 139, at 77 (version sent from Senate to House on Sept. 9, 1789).

peatedly in both state and federal constitutional debates. The New Jersey Constitution, for example, provided "[T]here shall be no establishment of any one religious sect . . . in preference to another."[151] Three drafts of the religion clauses included a similar guarantee: "Congress shall make no law establishing one religious sect or society in preference to others";[152] "Congress shall not make any law . . . establishing any religious sect or society";[153] "Congress shall make no law establishing any particular denomination of religion in preference to another."[154]

For still others, disestablishment of religion meant foreclosing government from coercively prescribing mandatory forms of religious belief, doctrine, and practice—in violation of the core guarantee of liberty of conscience. Such coercion of religion inflates the competence of government. As Madison wrote:

> [It] implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.[155]

Such coercion of religion also compromises the pacific ideals of most religions. Thomas Paine, who is usually branded as a religious skeptic, put this well:

> All religions are in their nature mild and benign, and united with principles of morality. They could not have made proselytes at first, by professing anything that was vicious, cruel, persecuting, or immoral. . . . Persecution is not an original feature in *any* religion; but it is always the strongly marked feature of all law-religions, or religions established by law. Take away the law-establishment, and every religion reassumes its original benignity.[156]

Such coercion of religion also compromises the individual's liberty of conscience. As the Pennsylvania Constitution put it: "[N]o authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul [sic], the right of conscience in the free exercise of religious worship."[157]

The vague language of the First Amendment—"Congress shall make no law respecting an establishment"—could readily accommodate these separationist, equality, or noncoercion readings of "disestablishment." Congress may not "establish religion" outright. Nor may Congress make laws that "respect" an establishment of religion—that is anticipate, "look towards," or "regard with deference," such an establishment, to use com-

151 N.J. CONST. of 1776, art. XIX.

152 Version first rejected by the Senate, then reconsidered and passed by the Senate, on September 3, 1789. 1 JOURNAL OF SENATE, *supra* note 139, at 116.

153 Version defeated by the Senate on September 3, 1789. *Id.*

154 Version rejected by the Senate on September 3, 1789. *Id.* at 117.

155 MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 56, para. 5.

156 THOMAS PAINE, RIGHTS OF MAN, pt.1 (1791), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 99, at 95-96.

157 PA. CONST. of 1776, art. II.

mon eighteenth century definitions of "respecting."[158] The best way to assess whether a Congressional law violates this prohibition is to see whether it compromises any one of the cardinal principles of separationism, equality, and noncoercion protected by the disestablishment guarantee.

7. Interdependence and Incorporation of Principles

For all the diversity of opinion one finds in the Constitutional Convention debates, pamphlets, sermons, editorials, and broadsides of the eighteenth century, most influential writers embraced this roll of "essential rights and liberties of religion"—liberty of conscience, free exercise of religion, pluralism, equality, separationism, and disestablishment of religion. To be sure, many of these terms carried multiple meanings in the later eighteenth century. And to be sure, numerous other terms and norms were under discussion. But in the range of official and unofficial sources at my disposal, these principles were the most commonly discussed and embraced.

On the one hand, eighteenth century writers designed these principles to provide an interwoven shield against repressive religious establishments. Liberty of conscience protected the individual from coercion and discriminatory treatment by church or state officials and guaranteed unencumbered, voluntary choices of faith. Free exercise of religion protected the individual's ability to discharge the duties of conscience through religious worship, speech, publication, assembly, and other actions without necessary reference to a prescribed creed, cult, or code of conduct. Pluralism protected multiple forms and forums of religious belief and action, in place of a uniformly mandated religious doctrine, liturgy, and polity. Equality protected religious individuals and bodies from special benefits and from special burdens administered by the state, or by other religious bodies. Separationism protected individual believers, as well as religious and political officials, from undue interference or intrusion on each other's processes and practices. Disestablishment precluded governmental prescriptions of the doctrine, liturgy, or morality of one faith, or compromises of the principles of liberty of conscience, free exercise, equality, pluralism, or separationism.

On the other hand, eighteenth century writers designed these principles to be mutually supportive and mutually subservient to the highest goal of guaranteeing "the essential rights and liberties of religion" for all. No single principle could by itself guarantee such religious liberty. Simple protection of liberty of conscience provided no protection of religious actions or organizations. Pure pluralism could decay into religious relativism and render the government blind to the special place of religion in the community and in the Constitution. Simple guarantees of the equality of religion could render governments indifferent to the widely divergent needs of different forms of religion. Pure separationism could deprive the church of all meaningful forms and functions, and deprive states of an essential ally

158 For illustrative eighteenth century texts, see 2 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2512 (1971) (under the term "respect").

in government and social service. Pure nonestablishment could readily rob society of all common values and beliefs and the state of any effective religious role. Eighteenth century writers, therefore, arranged these multiple principles into an interlocking and interdependent shield of religious liberties and rights for all. Religion was simply too vital and too valuable a source of individual flourishing and social cohesion to be left unguarded on any side.

It is in the context of this plurality of opinions and panoply of principles that the First Amendment religion clauses should, in my view, be understood. The religion clauses were a vital, but only a small, part of this initial constitutional protection of essential rights and liberties of religion. They bound only the national government, and (on their face) set only the outer boundaries to its conduct vis-à-vis religion—forbidding either prescriptions or proscriptions of religion. The religion clauses, together, were designed to legitimate, and to live off, the state constitutional guarantees of religious rights and liberties. The guarantees of disestablishment and free exercise depended for their efficacy both on each other[159] and on other religious rights and liberties that eighteenth century writers regarded as "essential." The guarantees of disestablishment and free exercise standing alone—as they came to be during the 1940s when the Supreme Court "incorporated" these two guarantees into the due process clause of the Fourteenth Amendment[160]—could legitimately be read to have multiple principles incorporated within them.

Indeed, it might not be too strong to say that the "first incorporation" of religious rights and liberties was engineered not by the Supreme Court in the 1940s when it incorporated the religion clauses into the due process clause, but by the First Congress in 1789 when it drafted the First Amendment religion clauses.[161] This "first incorporation"—if it can be so called—had two dimensions. First, the pregnant language that "Congress shall make no law *respecting an establishment* of religion" can be read as a confirmation and incorporation of prevailing state constitutional precepts and practices.[162] Such state practices included "the slender establishments" of religion in the New England states, which nonetheless included ample guarantees of liberty of conscience, free exercise, equality, plurality, and institutional separation of church and state.[163] Such practices also included the "establishments of religious freedom" (in Jefferson's phrase of 1779[164]) that prevailed in Virginia and other southern and middle states. The First Amendment drafters seem to have contemplated and confirmed

159 *See* ADAMS & EMMERICH, *supra* note 24, at 37-40, 70-73; Glendon & Yanes, *supra* note 14, at 540-41; Richard John Neuhaus, *A New Order of Religious Freedom*, *in* CHRISTIANITY AND DEMOCRACY IN GLOBAL CONTEXT 101-10 (John Witte, Jr. ed., 1993).

160 *See infra* notes 196-99 and accompanying text.

161 Some writers have also argued that passage of the Fourteenth Amendment due process clause introduced the first incorporation. *See* Lash, *supra* note 104; Poppel, *supra* note 15, at 254-56.

162 *See* ANTIEAU ET AL., *supra* note 72, at 132-33, 162-63; WILBUR G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 9-10 (1964).

163 *See generally* ANTIEAU ET AL., *supra* note 72; GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); KATZ, *supra* note 162.

164 Passed on October 31, 1785, *reprinted in* MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 56, at 399-401. The act was a slightly revised version of Jefferson's *Bill for Establishing Religious*

a plurality of constitutional constructions "respecting" religion and its establishment. Second, the embracive terms "free exercise" and "establishment" can be read to incorporate the full range of "essential rights and liberties" discussed in the eighteenth century. Eighteenth century writers often used the term "free exercise" synonymously with liberty of conscience, equality, separationism, and pluralism.[165] They similarly regarded "non" or "disestablishment" as a generic guarantee of separationism, pluralism, equality, free exercise, and liberty of conscience.[166] Read in context, therefore, the cryptic religion clauses of the First Amendment can be seen to embody—to incorporate—multiple expressions of the "essential rights and liberties of religion."

II. The "Exodus" of the American Constitutional Experiment

A. *From Multiplicity to Uniformity*

1. State Constitutional Practices

The "essential rights and liberties of religion" forged in the early republic came to ready application in the unfolding of the American experiment in the nineteenth and early twentieth centuries. Consistent with the doctrine of federalism that informed the United States Constitution in general and the First Amendment religion clauses in particular, primary political responsibility for religion and the church was left to state governments. By 1833, the constitution of every state guaranteed liberty of conscience and free exercise of religion for all, and many included further guarantees of pluralism, equality, separationism, and disestablishment.[167] The most intrusive and overt forms of religious establishment and state control of religion fell away. A plurality of religious sects came to flourish in the states, many supporting their own religious schools, charities, clubs, and other voluntary associations.[168]

To be sure, glaring vestiges of religious establishment and discrimination remained in place among the states. Virginia, for example, revoked the corporate charters of the Episcopal churches in the 1790s and 1800s and thereafter sought to confiscate or taxed large portions of their properties not devoted to religious uses.[169] Massachusetts, New Hampshire, and Vermont adopted equally discriminatory policies towards the properties of

Freedom (June 12, 1779), which had been twice defeated while he was Governor. *See* Charles F. James, Documentary History of the Struggle for Religious Liberty in Virginia 68-141 (1900).

165 *See supra* notes 87-89 & 115-41 and accompanying text.

166 *See supra* notes 149-58.

167 For multiple editions of these state constitutions, see The Federal and State Constitutions, Colonial Charters, and Other Organic Laws (Francis N. Thorpe ed., 1909). For a comprehensive collection of relevant constitutional clauses on religion, see Chester J. Antieau et al., Religion Under the State Constitutions app. at 173-239 (1965).

168 On the emerging plurality of American religion, see generally Martin E. Marty, Pilgrims in Their Own Land: 500 Years of Religion in America (1984).

169 *See* Eckenrode, *supra* note 61, at 116-55; Kauper & Ellis, *supra* note 60, at 1529-33. In Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815), the United States Supreme Court declared invalid the confiscation of church property in Alexandria authorized by Virginia statutes of 1798 and 1801.

Quakers, Baptists, and Episcopalians,[170] and routinely denied or delayed delivery of corporate charters, tax exemptions, and educational licenses to non-Congregational bodies.[171] New York and New Jersey dealt churlishly with Unitarians and Catholics throughout the nineteenth century. Few legislatures and courts showed respect for the religious rights of Jews and Mormons, let alone those of native American Indians and African-American slaves.[172] Such abridgements of religious rights and liberties are an ineradicable part of the American constitutional tradition.

The general guarantees of disestablishment and free exercise of religion in the state constitutions did not foreclose officials from supporting religious believers and religious bodies, particularly those that were Christian. A "mass of organic utterances,"[173] as the Supreme Court later put it, testify to the presence of a vibrant civil religion, a *de facto* Christian establishment, in the America of the nineteenth and early twentieth centuries—a civil religion, rooted principally in Puritan and civic republican rationales.

Government officials, for example, regularly acknowledged and endorsed religious beliefs and practices. "In God We Trust" and similar confessions appeared on currency and stamps. Various homages to God and religion appeared on state seals and state documents. The Ten Commandments and favorite Bible verses were inscribed on the walls of court houses, schools, and other public buildings. Crucifixes and other Christian symbols were erected in state parks and on state house grounds. Flags flew at half mast on Good Friday and other high holy days. Christmas, Easter, and other holy days were official holidays. Sundays remained official days of rest. Government-sponsored chaplains were appointed to Congress, the military, and various governmental asylums, prisons, and hospitals. Prayers were offered at the commencement of each session of Congress and of many state legislatures. Thanksgiving Day prayers were offered by presidents, governors, and other state officials.[174] These and numerous other instances of official endorsement of a civil religion were commonplace in the early unfolding of the American experiment.[175]

Government officials afforded various forms of aid to religious groups. States underwrote the costs of Bibles and liturgical books for rural churches and occasionally donated land and services to them. Federal and

170 *See, e.g.*, JAMES ELLIS, A NARRATIVE OF THE RISE, PROGRESS, AND ISSUE OF THE LATE LAW-SUITS RELATIVE TO PROPERTY HELD AND DEVOTED TO PIOUS USES IN THE FIRST PRECINCT IN REHOBOTH (1795); JOHN COSENS OGDEN, A SHORT HISTORY OF THE ECCLESIASTICAL OPPRESSIONS IN NEW-ENGLAND AND VERMONT (1799).

171 For illustrative cases, see MARK DEWOLFE HOWE, CASES ON CHURCH AND STATE IN THE UNITED STATES 27-83 (1952). *See also* JOHN T. NOONAN, JR., THE BELIEVERS AND THE POWERS THAT ARE 139-60 (1987).

172 *See generally* MORTON BORDEN, JEWS, TURKS, AND INFIDELS (1984); LAWRENCE H. FUCHS, THE AMERICAN KALEIDESCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE (1990); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1955).

173 Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

174 *Id.* at 465-72.

175 *See* Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777 (1986); ANTIEAU, ET AL., *supra* note 105; CORNELISON, *supra* note 76; PHILIP SCHAFF, CHURCH AND STATE IN THE UNITED STATES, OR THE AMERICAN IDEA OF RELIGIOUS LIBERTY AND ITS PRACTICAL EFFECTS (1888); STOKES & PFEFFER, *supra* note 88; CARL ZOLLMANN, AMERICAN CIVIL CHURCH LAW (1917).

state subsidies were given to Christian missionaries who proselytized among the native American Indians. Property grants and tax subsidies were furnished to Christian schools and charities. Special criminal laws protected the property and clergy of the churches. Tax exemptions were accorded to the real and personal properties of many churches, clerics, and charities. Numerous other forms of direct and indirect aid to religion and the church were countenanced.[176]

Government officials predicated some of their laws and policies directly on the moral and religious teachings of the Bible and the church. The first public schools and state universities had mandatory courses in religion and theology and compulsory attendance in daily chapel and Sunday worship services. Employees in state prisons, reformatories, orphanages, and asylums were required to know and to teach basic Christian beliefs and values. Polygamy, prostitution, pornography, and other sexual offenses against Christian morals and mores were prohibited. Blasphemy, sacrilege, and false swearing were still prosecuted. Gambling houses, lotteries, fortune-telling, and other activities that depended on fate or magic were forbidden. In many jurisdictions, these and other laws and policies were predicated on explicitly religious, and usually Christian, grounds. It was a commonplace of nineteenth century legal thought that "Christianity is a part of the common law."[177]

The promulgation of these laws and policies gave rise to some great debates in state legislatures across the country. The enforcement of these laws in the courts occasioned some vitriolic dissenting opinions.[178] The arguments for these laws and policies were often framed in classic terms of Puritanism and civic republicanism; those against sounded in classic terms of evangelical theology and enlightenment politics. Those inclined to Puritan and civic republican views saw these laws and policies as appropriate forms of nonpreferential state aid to, and accommodation of, the civic and sectarian religions of the nation. Those inclined to enlightenment and evangelical perspectives saw them as vestiges of traditional religious establishments and compromises of the ideals of separationism and voluntarism.

2. The Supreme Court Restrained

For much of the nineteenth and early twentieth centuries, the United States Supreme Court had little occasion to interpret and apply the First Amendment religion clauses. It was widely understood that state constitutions, not the federal constitution, governed most religious affairs of the republic.[179] The various attempts to develop a general law on religious liberty applicable to the states and enforceable in the federal courts—most

176 ZOLLMANN, *supra* note 175.

177 *See* 2 THE WORKS OF JAMES WILSON, *supra* note 44, at 671 (citing WILLIAM BLACKSTONE, COMMENTARIES 59 (1765) (where Blackstone writes "Christianity is part of the laws of England")). For examples of these nineteenth century sentiments in America, see HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 209-19 (1993).

178 For a good sampling, see NOONAN, *supra* note 171, at 127-232; ANTIEAU, ET AL., *supra* note 105, at 1-110; HOWE, *supra* note 171.

179 *See, e.g.*, 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 597 (2d ed. 1851); Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845) ("The Constitution makes no provision

notably the agitation in 1875-1876 for Congress to pass the Blaine Amendment to the United States Constitution—were defeated.[180] Few cases involving religious rights and liberties, therefore, came to the United States Supreme Court—only twenty-three between 1789 and 1940.

These early Supreme Court cases did little to advance the American experiment. The Court offered only rudimentary analysis of the subject in a handful of cases concerning the maintenance and division of church properties.[181] The Court offered an extremely narrow reading of the free exercise clause to uphold various Congressional restrictions on Mormon teachings and practices of polygamy. In *Reynolds v. United States* (1879), which upheld a federal law prohibiting polygamy against a free exercise challenge, Chief Justice Waite took Jefferson's adage of "building a wall of separation between Church and State . . . almost as an authoritative declaration of the scope and effect of the [first] amendment thus secured."[182] The free exercise clause protects religious beliefs, not religious actions, argued Waite. "Congress was deprived of all legislative power over mere opinion, but was left free to reach [religious] actions which were in violation of social duties or subversive of good order."[183] This Congressional "freedom," the Court continued in *Davis v. Beason* (1890), could not be "comprised" by judicial creations of a free exercise exemption from general legislation. To exempt Mormons from criminal prohibitions against the preaching or practice of polygamy, Justice Field thundered for the Court, "would shock the moral judgment of the community . . . [and] offend the common sense of mankind."[184] The *Davis* Court thus upheld the conviction of a Mormon who swore falsely that he was not a member of a polygamous organization—and would hear nothing of his argument that to criminalize religiously based polygamy would be to establish religiously based monogamy.[185] In another case the same term, the Court upheld Congress's revocation of the corporate charter of the Mormon church and the confiscation of its property for its continued adherence to polygamy—and would hear nothing of its claim to corporate free exercise rights.[186] These early cases left little chance for the "essential rights and liberties of

for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws.").

180 *See* Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951); F. William O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L. REV. 137 (1963); *see also* F. William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 WASHBURN L.J. 183 (1965) (listing 16 failed attempts to introduce such amendments to the United States Constitution). Today, there is ample agitation for Congress to pass an amendment to reintroduce prayer in public schools and to pass an amendment protecting religious equality. *See generally* Derek Davis, *Editorial: Assessing the Proposed Religious Equality Amendment*, 37 J. CHURCH & ST. 493 (1995).

181 Speidel v. Henrici, 120 U.S. 377 (1887); Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853); Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589 (1845); Vidal v. Mayor of Philadelphia, 43 U.S. (2 How.) 127 (1844); Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815).

182 Reynolds v. United States, 98 U.S. 145, 164 (1879). For a discussion of Jefferson's view, see *supra* notes 144-45 and accompanying text.

183 *Reynolds*, 98 U.S. at 164.

184 Davis v. Beason, 133 U.S. 333, 341-42 (1890). For a similar result, see Cleveland v. United States, 329 U.S. 14 (1946).

185 *Davis*, 133 U.S. at 336-37.

186 Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890).

religion" to leaven the Court's First Amendment jurisprudence. The Court effectively reduced the religion clauses to a bare-bones guarantee of liberty of conscience of the individual alone, and even that was compromised.[187]

In a few cases at the turn of the twentieth century, the Court offered a more expansive reading of the "essential rights and liberties of religion" incorporated in the First Amendment. Following the principles of protecting the equality of religion and fostering a plurality of religious forms and forums in the community, the Court upheld the allocation of federal funds to help build a Catholic hospital[188] and to help operate a Catholic mission school among the native American Indians.[189] Consistent with the principles of separationism and structural pluralism, the Court insisted that religious bodies may resolve their property disputes among themselves without state interference,[190] may hold monastic properties in community despite countervailing private property rules,[191] may appoint their clergy from abroad without Congressional interference,[192] and may teach their children in separate religious schools without undue state intrusion or deprivation.[193] In *Watson v. Jones* (1872), where the Court commanded state deference to ecclesiastical resolutions of a church property dispute, Justice Miller offered a crisp rendition of the basics of individual and corporate religious rights and liberties that generally supported these holdings:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association . . . is unquestioned.[194]

Justice Strong amplified the principles of liberty of conscience and separation of church and state in *Bouldin v. Alexander* the same term, stating for the Court: "[W]e have no power to revise or question ordinary acts of church discipline, or of excision of church membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."[195] These early cases,

187 For criticisms, see Smith, *supra* note 5; Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713 (1993).

188 Bradfield v. Roberts, 175 U.S. 291 (1899).

189 Quick Bear v. Leupp, 210 U.S. 50 (1908).

190 Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

191 Order of St. Benedict v. Steinhauser, 234 U.S. 640 (1914).

192 Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

193 Cochran v. Louisiana St. Bd. of Educ., 281 U.S. 370 (1930); Farrington v. Tokushige, 273 U.S. 284 (1927); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

194 *Watson*, 80 U.S. at 728-29.

195 *Bouldin*, 82 U.S. at 139-40. Justice Strong elaborates these sentiments in his TWO LECTURES UPON THE RELATIONS OF CIVIL LAW TO CHURCH POLITY, DISCIPLINE, AND PROPERTY (1875).

though suggestive, were largely incidental to the early unfolding of the American experiment in religious rights and liberties.

3. Incorporation

This early division of responsibility for the American experiment—leaving principal political responsibility for religion to state governments with only occasional involvement by the federal judiciary—changed abruptly in the 1940s. Under growing pressure to remove the disparities in treatment of religion among the states and to protect religious minorities, particularly Jehovah's Witnesses, the United States Supreme Court breathed new life into the religion clauses.

In the landmark cases of *Cantwell v. Connecticut* (1940)[196] and *Everson v. Board of Education* (1947),[197] the Court incorporated the free exercise and establishment clauses of the First Amendment into the due process clause of the Fourteenth Amendment. With matter-of-fact simplicity, Justice Roberts declared for the Court in *Cantwell*:

> The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.[198]

This so-called "incorporation doctrine"—which had already been applied to several other provisions of the 1791 Bill of Rights[199]—made the religion clauses binding on both the federal and state governments. The doctrine allowed the Court for the first time to review state and local policies on religion and the church. Regarding the federalist premises of 1787 to be modified by the Fourteenth Amendment due process clause, the Supreme Court set out to create a uniform constitutional law of religious rights and liberties that would be enforceable throughout the nation. In nearly 100 cases decided after 1940, the Supreme Court took firm control of the American experiment.

The First Amendment case law of the past half century is eminently familiar terrain to the cognoscenti.[200] My goal is not to restate what has

196 310 U.S. 296 (1940).

197 330 U.S. 1 (1947).

198 *Cantwell*, 310 U.S. at 303. The Court had hinted at its intentions in the dicta of two earlier cases. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court indicated that the Fourteenth Amendment liberty clause includes the right to "worship God according to the dictates of his own conscience." *Id.* at 399. In Hamilton v. Regents of the University of California, 293 U.S. 245 (1934), the Court indicated more directly that this same liberty clause includes "the right to entertain the beliefs, to adhere to the principles and to teach the doctrines" of pacifism. *Id.* at 262. In concurrence, Justice Cardozo put the matter more generically: "I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states." *Id.* at 265 (Cardozo, J., concurring).

199 *See* Poppel, *supra* note 15, at 254-60, 272-85.

200 Good collections are provided in NOONAN, *supra* note 171; ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT (4th ed. 1992 & Supp. 1993). Good summaries are provided in Glendon & Yanes, *supra* note 14; JOHN H.

already been well and oft stated; it is, rather, to analyze the plight of the "essential rights and liberties of religion" in the familiar free exercise and establishment clause cases. The two lines of cases move in opposite directions in their treatment of these essential rights and liberties. The early free exercise cases accommodated all the essential rights and liberties of religion—liberty of conscience, free exercise, equality, pluralism, and separationism. But the cases of the past fifteen years have effectively reduced the free exercise clause to the single and simple guarantee of equality (or neutrality).[201] Most of the early establishment clause cases focused exclusively on the principle of separationism. But the cases of the past fifteen years have effectively brought within the orbit of the establishment clause the principles of liberty of conscience (coercion), free exercise equality, and pluralism. The next two sections analyze these inverse trends.

B. Modern Free Exercise Law

1. Multiple Principles

In *Cantwell*, the Court incorporated the free exercise clause into the Fourteenth Amendment due process clause. Thereafter, the Court proceeded to incorporate into the free exercise clause (and sometimes also the free speech clause when applied to religion) a number of the "essential rights and liberties of religion" forged in the early republic. In *Cantwell* itself, the Court read the free exercise clause in capacious terms—as a protection for the beliefs of conscience and religious actions of all religious faiths, up to the familiar limits of public peace and order, and countervailing constitutional rights. Softening the rigid belief-vs.-act dualism of the Mormon polygamy cases, Justice Roberts wrote for the majority:

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. . . . [A] state may by general and nondiscriminatory legislation regulate the times, the places, and the manner of [religious exercise] . . . and may in other respects safeguard the peace, good order, and comfort of the community.[202]

GARVEY & FREDERICK SHAUER, THE FIRST AMENDMENT: A READER 428-633 (2d ed. 1996); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Carl H. Esbeck, *Table of United States Supreme Court Decisions Relating to Religious Liberty, 1789-1994*, 10 J.L. & RELIGION 573 (1994).

201 *See infra* notes 249-58.

202 *Cantwell*, 310 U.S. at 303-04.

"The essential characteristic of these liberties," Justice Roberts added, with a nod to the principle of confessional pluralism, "is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and many creeds."[203]

In more than a dozen subsequent cases over the next two decades, the Court expanded its reading of the free exercise clause to embrace the full range of "essential rights and liberties of religion." "[N]o single principle can answer all of life's complexities," especially those surrounding the "right to freedom of religious belief," Justice Frankfurter wrote wisely (in an otherwise unwise opinion in 1940).[204] The Court took his maxim to heart. Consistent with the principle of liberty of conscience, the Court held that a public school could not require a student, who was conscientiously opposed, to salute the flag and recite the pledge,[205] but that a public school could allow religious children to be released from schools to attend religious services off school grounds.[206] It likewise held that a governmental official could not require a party, who was conscientiously opposed, to swear an oath before receiving citizenship status,[207] a property tax exemption,[208] or a state bureaucratic position.[209] "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual," Justice Douglas wrote for the Court in *Girouard v. United States* (1946), contrary to the Court's earlier statements in the Mormon polygamy cases.[210] Accommodation of liberty of conscience sometimes requires exemption from generally applicable government prescriptions.

Consistent with the principle of equality of all peaceable religions before the law, the Court struck down several permit, licensing, and taxing ordinances that targeted, and burdened, the core proselytizing activities of Jehovah's Witnesses, who had emerged prominently in urban America in the early twentieth century.[211] The Court also struck down an ordinance

203 *Id.* at 310.

204 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940), *rev'd*, West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

205 *Barnette*, 319 U.S. at 624.

206 Zorach v. Clauson, 343 U.S. 306 (1952). Though this case is generally read as an establishment clause case, Justice Douglas reviewed the practice under both religion clauses, finding no violation. With respect to the free exercise clause, he wrote: "It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions if any." *Id.* at 311.

207 Girouard v. United States, 328 U.S. 61 (1946). This case also turned on the test oath clause of Article VI.

208 First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1957).

209 Torcaso v. Watkins, 367 U.S. 488 (1961). *But cf. In re* Summers, 325 U.S. 561 (1945) (religiously scrupulous applicant received no free exercise right to exemption from an oath required to stand for the bar).

210 *Girouard*, 328 U.S. at 68. *See supra* notes 181-87 and accompanying text (on Mormon polygamy cases).

211 Tucker v. Texas, 326 U.S. 517 (1946); Follett v. McCormick, 321 U.S. 573 (1944); Martin v. Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 104 (1943); Jones v. Opelika (II), 319 U.S. 103 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943).

that permitted church services, but prohibited other forms of religious speech in a public park.[212] The principle of equality demanded that only indiscriminately applied permit requirements[213] or generally applicable criminal laws could be upheld against free exercise or (religious) free speech challenges.[214] Several times in its early free exercise (and free speech) opinions, the Court stressed the importance of protecting equally a plurality of forms of faith. Even Justice Frankfurter and Justice Black, whose interpretations of the religion clauses were often criticized, defended this principle earnestly. "Propagation of belief—or even of disbelief—in the supernatural is protected, whether in church or chapel, mosque or synagogue, tabernacle or meeting-house," wrote Justice Frankfurter in the infamous *Gobitis* case. "Likewise the Constitution assures generous immunity to the individual from imposition of penalties for offending, in the course of his own religious activities, the religious views of others, be they a minority or those dominant in government."[215] The free exercise clause, Justice Black echoed in *Everson*, mandates that government "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[216]

Consistent with the principles of pluralism and separationism, the Court in the 1952 case of *Kedroff v. Saint Nicholas Cathedral* held that a religious organization has the free exercise right to resolve their own disputes over doctrine and liturgy, polity and property without interference by the state.[217] In striking down a New York religious corporation law, passed in the Cold War era, that rejected the authority of the Moscow Patriarch over the local Russian Orthodox Church, the Court declared, in the majority opinion of Justice Reed:

> Here there is a transfer by statute of control over churches. This violates our rule of separation of church and state.
>
> . . . .
>
> [It also violates] a spirit of freedom for religious organizations, an independence from secular control and manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said have federal constitutional protection as a part of the free exercise of religion against state interference.[218]

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212 Fowler v. Rhode Island, 345 U.S. 67 (1953).

213 Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding general parade permit, offered on a sliding fee scale, for all processions).

214 *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (breach of peace conviction for Jehovah's Witness using "fighting words" upheld against free speech and free exercise challenge); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor statute upheld against free exercise claims of both parent and minor arrested for religious soliciting).

215 *Gobitis*, 310 U.S. at 593.

216 *Everson*, 330 U.S. at 16.

217 Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952).

218 *Id.* at 116.

2. Compelling State Interest Test

In the landmark case of *Sherbert v. Verner* (1963), the Court began to cast these early multi-principled readings of the free exercise clause (and free speech clause) into a constitutional test.[219] The case raised a precise free exercise claim to receive a specific state benefit. A Seventh Day Adventist was discharged from employment, and foreclosed from reemployment, because of her conscientious refusal to work on Saturday, her Sabbath Day. She was denied unemployment compensation from the state, for she had been, according to the applicable statute, discharged "for cause" and was thus disqualified from the benefit. She appealed, arguing that the disqualifying provisions of the statute "abridged her right to the free exercise of her religion," and that the same statute, which explicitly exempted Sunday Sabbatarians from the same disqualification, was religiously discriminatory. The Supreme Court agreed, with Justice Brennan's majority opinion stating its principal rationale in terms of liberty of conscience: "[T]o condition the availability of [state] benefits upon this appellant's willingness to violate a cardinal principle of her religious faith, effectively penalizes the free exercise of her constitutional liberties."[220] Moreover, to disqualify a Saturday Sabbatarian from such benefits but to grant them to Sunday Sabbatarians "compound[s]" the constitutional violation with "religious discrimination" in violation of the principle of religious equality.[221]

The Court took this case as an occasion to lay the groundwork for a more nuanced free exercise test in lieu of the simple balancing tests that had prevailed in earlier cases. Henceforth, a governmental policy or law that was challenged under the free exercise clause would pass constitutional muster only if it: (1) served a compelling state interest; (2) was proportionately tailored to achieve that interest with the least possible intrusion on free exercise rights; and (3) was nondiscriminatory against religion on its face or in application. Governmental policies that met these criteria could be enforced; those that did not meet such criteria were either to be struck down, or applied in a manner that minimized, or eliminated, their affront to religion.[222]

This "compelling state interest test," as it came to be called, served to draw together the classic principles of liberty of conscience, free exercise, equality, pluralism, and separationism, and to accord free exercise protection to both religious individuals and religious groups. It also served to mold the free exercise clause into a more delicate and flexible instrument that could counter both overt and covert forms of religious discrimination, and could accommodate both traditional and novel needs of the growing plurality of religious groups seeking First Amendment protection. Justice Douglas stated this purpose well in his concurring opinion in *Sherbert*:

219 Sherbert v. Verner, 374 U.S. 398 (1963).
220 *Id.* at 406.
221 *Id.*
222 *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 17-18.

> Religious scruples of Moslems require them to attend a mosque on Friday and to pray five times daily. Religious scruples of a Sikh require him to carry a regular or a symbolic sword. Religious scruples of a Jehovah's Witness teach him to be a colporteur, going from door to door, from town to town, distributing his religious pamphlets. Religious scruples of a Quaker compel him to refrain from swearing [an oath] and to affirm instead. Religious scruples of a Buddhist may require him to refrain from partaking of any flesh.
>
> The examples could be multiplied . . . to show that many people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of "police" or "health" regulations reflecting the majority's views.[223]

The Supreme Court was consciously adjusting the American experiment to accommodate the growing religious pluralism of the nation.

As Justice Douglas predicted, the *Sherbert* compelling state interest test rendered the free exercise clause a formidable obstacle to both subtle and overt forms of religious prejudice and insensitivity. Consistent with the principle of liberty of conscience, the Court extended the technical *Sherbert* holding to instances where applicants who sought unemployment compensation had individual scruples, not shared by their co-religionists, against indirect production of military hardware,[224] were newly converted to their Sabbatarian beliefs,[225] or held highly individualized views of the Sabbath.[226] Neither the novelty nor the idiosyncrasy of a religious belief should deprive its adherent from free exercise protection and from receipt of unemployment compensation. In Chief Justice Burger's words: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists" that violates the free exercise clause.[227] Similarly, the Court struck down state constitutional prohibitions against clerical partici-

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223 *Sherbert*, 374 U.S. at 411 (Douglas, J., concurring).

224 Thomas v. Review Bd., 450 U.S. 707 (1981).

225 Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (free exercise claimant who converted to Seventh Day Adventist Sabbatarian beliefs two years after employment).

226 Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989) (free exercise claimant who had a "personal professed religious belief" in Sabbath as a day of rest, though not a day of worship).

227 *Thomas*, 450 U.S. at 717-18. This same principle had, earlier, been denied to Jewish groups who sought free exercise exemptions from Sunday blue laws. Their argument was that state law prohibited Sunday work, religious law prohibited Saturday work. This put Jewish merchants and workers at a general commercial disadvantage, and required kosher establishments to be closed to Jewish communities for two days, instead of one. The Court was not convinced that such regulations burdened "Jewish religion" per se. *See* Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); *see also* Two Guys from Harrison Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) (holding that Sunday legislation did not violate the establishment clause). After these cases, most states revised their Sabbath day laws. *See generally* Barbara J. Redman, *Sabbatarian Accommodation in the Supreme Court*, 33 J. CHURCH & ST. 495 (1991); Jerome A. Barron, *Sunday in North America*, 79 HARV. L. REV. 42 (1965).

pation in political office, arguing that: "The State is 'punishing a religious profession with the privation of a civil right.'"[228]

Not only religious individuals, but also religious groups were able to claim the panoply of rights and liberties embraced in the "compelling state interest" test. In a series of free exercise and free speech cases over the past dozen years, the Court has held that voluntarily organized groups of religious students must be given *equal access* to public university and high school facilities if such access is granted to nonreligious student groups.[229] Voluntarily convened religious groups in the community must have equal access to public school facilities if they are made available to other nonreligious groups.[230] Student-run religious publishing groups at a public university must have equal access to school subsidies made available to other religious and nonreligious publishing groups.[231] In each of these cases, the principles of voluntarism, equality, nondiscrimination, and religious pluralism, collectively, overrode the concerns with the principle of separationism raised in the establishment clause.

The same free exercise principles have been extended to other religious groups. Thus religious schools are permitted to choose their teachers without general labor law controls,[232] and religious employers are permitted to engage in the religious discrimination that is mandated by their faith—particularly in the employment of religious officials.[233] Similarly, religious organizations are permitted to resolve their own disputes over polity and property, without state intrusion.[234] In *Orthodox Diocese v. Milivojevich* (1976), which prohibited even "marginal review" by a civil court of an ecclesiastical decision, Justice Brennan speaking for the Court

228 McDaniel v. Paty, 435 U.S. 618, 626 (1978) (quoting 5 WRITINGS OF JAMES MADISON, *supra* note 3, at 288).

229 Widmar v. Vincent, 454 U.S. 263 (1981). This "equal access" principle, which was based on both free exercise and free speech grounds, was later extended to public high schools. See Equal Access Act, 20 U.S.C. §§ 4071-4074 (1994), which was upheld against establishment clause challenge in Board of Educ. v. Mergens, 496 U.S. 226 (1990).

230 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993); *see also* Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (holding that the free speech clause prohibits a ban on "First Amendment activities," including religious solicitation in an airport). *But cf.* Lee v. International Soc'y for Krishna Consciousness, 505 U.S. 672 (1992) (holding that regulations of religious solicitation in a limited forum like an airport need only satisfy "reasonableness" standards).

231 Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995). This case was decided on free speech grounds.

232 NLRB v. Catholic Bishop, 440 U.S. 490 (1979); *see also* Saint Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981) (applying the Federal Unemployment Tax Act to church schools).

233 Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding Civil Rights Act provision for religious discrimination by religious employers). The Civil Rights Act bans religious discrimination by private, nonreligious employers, which the Court has held requires "reasonable accommodations" of employee's religious needs, at no more than "de minimis" cost. Trans World Airlines v. Hardison, 432 U.S. 63 (1977); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1987); *see* David L. Gregory, *The Role of Religion in the Secular Workplace*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 749 (1990); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987).

234 Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Serbian East Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). *But see* Maryland Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970) (allowing resolution of some property disputes not involving "doctrinal controversy"); Jones v. Wolf, 443 U.S. 595 (1979) (allowing secular disputes within the church to be resolved using "neutral principles of law").

declared: "Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." The Constitution allows "religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes . . . the Constitution requires that civil courts accept their decisions as binding upon them."[235]

In its most far-reaching free exercise case, *Wisconsin v. Yoder* (1972), the Court required that Amish parents and communities be exempted from full compliance with compulsory school attendance laws for their children, in order to preserve their ascetic, agrarian communitarianism.[236] What seemed to impress the Court was that the Amish "lifestyle" was "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living," and that these "religious beliefs and attitudes towards life, family and home . . . have not altered in fundamentals for centuries." In the Court's view, compliance with the compulsory school attendance law "carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[237] Thus the free exercise clause compels an exemption from a law that clearly, and reasonably, fostered "a compelling state interest" to educate children.

The compelling state interest test—though it had been tailored conveniently, and sometimes stretched to the breaking point in the foregoing cases—did not always yield judgments in favor of religious petitioners, even in what Ira Lupu has called the "golden age" of religious liberty from 1963 to 1986.[238] Where governmental policies met the criteria of the "compelling state interest" test, they were upheld despite their burden on free exercise interests. Thus a Jehovah's Witness child could receive a blood transfusion, despite the religious objection of conscientiously opposed parents.[239] Religious pacifists could not withhold their taxes just because a portion of them supported the military.[240] The Amish could not withhold social security taxes just because of their religious objections to social welfare.[241] Hare Krishnas and other proselytizers could not demand exemption from general restrictions on sale or distribution of religious goods or articles on state fair grounds.[242] An itinerant missionary could not claim

235 *Milivojevich*, 426 U.S. at 724-25. *See generally* Louis Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335 (1986); Frederick M. Gedicks, *Toward A Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

236 Wisconsin v. Yoder, 406 U.S. 205 (1972).

237 *Id.* at 216-18.

238 Lupu, *supra* note 15, at 230. For Lupu's critical review of these cases, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

239 Jehovah's Witnesses v. King County Hosp., 390 U.S. 598 (1968).

240 United States v. American Friends Serv. Comm., 419 U.S. 7 (1974).

241 United States v. Lee, 455 U.S. 252 (1982).

242 Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

free exercise exemptions from state sale and use taxes collected on articles sold at crusades or through the mails.[243] A private religious university, which practiced racial discrimination on religious grounds, could not voice free exercise objections to the withdrawal of its federal tax exempt status as a penalty for violating national policy.[244] A religiously affiliated charity could not claim free exercise exemptions from general labor standards.[245] A Scientologist could not take a tax deduction for "auditing or training" fees paid to the church,[246] nor could Mormon parents take a tax deduction for funds sent to support their sons' church-supervised mission work.[247]

The prevailing logic in these cases was that the free exercise clause is not an absolute license to freedom from all generally applicable governmental policies. It is a protection against generally repressive government policies, or those that strike at the *cardinal* religious convictions and conduct of a particular individual or group. If one party's, or group's, religious exercise violates the life, liberty and property of another, threatens public peace and order, or flouts pressing national policies respecting race, the military, or taxes, then state interests may outweigh religious interests, constitutional power may preeempt constitutional rights.

3. Toward a Single Principle

While this generous reading of the "essential rights and liberties of religion" is today partially preserved in the "equal access" free speech cases,[248] the general tenor of recent free exercise cases is much more churlish. *Goldman v. Weinberger* (1986)[249] provided the first clear sign of the Court's shift towards a narrower reading of these essential rights and liberties incorporated in the free exercise clause. There the Court held that the First Amendment does not prohibit the air force from prohibiting a rabbi from wearing his yarmulke as part of his military uniform. The Court so held even though the petitioner served as a psychologist in the mental health clinic of a military base (not on the front lines), even though for three years earlier he was accorded this "privilege," and even though numerous other exemptions for religious garb were accorded by the military dress code. The requirements for military discipline and uniformity, in the Court's view, outweighed the countervailing religious interests—however deep-seated and essential they were to the petitioner. In *O'Lone v. Estate of Shabbaz* (1987),[250] the Court extended this logic from military officials to prison officials, holding that a change in prison policy that deprived Muslim inmates from attending Jumu'ah, their Friday collective worship service, did not violate their free exercise rights. Here the requirements for

243 Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990).
244 Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
245 Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985).
246 Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989).
247 Davis v. United States, 495 U.S. 472 (1990).
248 *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (decided on free speech grounds). The initial "equal access" case, *Widmar v. Vincent*, was decided on free exercise and free speech grounds. 454 U.S. 263, 276 (1981).
249 475 U.S. 503 (1986).
250 482 U.S. 342 (1987); *see id.* at 348.

security, protection of other prisoners, and other "valid penological objectives," in the Court's view, outweighed the free exercise rights of the Muslim prisoners. In *Lyng v. Northwest Indian Cemetery Protective Ass'n* (1988),[251] the Court extended this logic to the U.S. Forest Service, holding that the free exercise clause does not prohibit the Forest Service's construction of a road through the middle of a sacred site used for centuries by Indians—notwithstanding the injunctions of the American Indian Religious Freedom Act,[252] and the Court's recognition that this construction "will have severe adverse effects on the practice of their religion."[253] Justice O'Connor defended this holding with blunt literalism:

> The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual." . . . However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.[254]

In two years, the marginally tenable logic of *Goldman*—that the special needs of the military to protect discipline must outweigh individual rights claims—had been transmuted into the tenuous argument of *Lyng*—that busy governmental officials simply do not have time to accommodate the diverse religious interests of citizens, however sincere, long-standing, or widely prevalent those religious interests might be.

While these cases may have been isolated to their facts, *Employment Division v. Smith* (1990) wove their holdings into a new, and narrow, free exercise test.[255] Smith, a native American Indian, periodically ingested peyote as part of the sacramental rite of the native American church of which he was a member. Discharged from employment at a drug rehabilitation

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251 485 U.S. 439 (1988).

252 42 U.S.C. § 1996 (1988 & Supp. V 1993). The Act provides, in pertinent part:

> It shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

See generally HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM (Christopher Vecsey ed., 1991); Ann E. Beeson, *Dances With Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121 (1992).

253 *Lyng*, 485 U.S. at 447; *see also id.* at 451 (recognizing "devastating effects on traditional Indian religious practices").

254 *Id.* at 451-52 (citations omitted).

255 494 U.S. 872 (1990).

center because of this practice, he applied for unemployment compensation from the State of Oregon. Such compensation was denied, on grounds that peyote ingestion was disqualifying criminal misconduct. Smith appealed, ultimately to the Supreme Court, claiming a violation of his free exercise rights. The Court rejected his argument, even though the case fell easily within the holdings of unemployment compensation cases inaugurated by *Sherbert v. Verner.* More importantly, the Court denied the validity of the *Sherbert* "compelling state interest" test altogether, and explained away its application in subsequent cases. Henceforth, Justice Scalia wrote for the majority, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'. . . ."[256] Such laws, when promulgated under proper procedures, must prevail—regardless of the nature of the state's interest and regardless of any intrusion on the interest of a religious believer or body. Religious petitioners, whose beliefs or practices are burdened by such neutral, generally applicable laws, must seek redress in the legislatures, not the courts.[257]

Smith effectively reduced the free exercise guarantee to the single principle of equality or neutrality, and effectively rejected the various other "essential rights and liberties of religion" that traditionally informed its free exercise analysis. Since 1990, dozens of lower court cases, presenting local statutes and practices that are patently discriminatory against religion, have tested the logic of *Smith.*[258]

The Supreme Court itself has only slightly blunted this logic in its most recent free exercise case, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993).[259] The case posed a free exercise challenge to a city ordinance that singled out local followers of the Santerian faith to special restrictions and penalties for engaging in the ritual slaughter of animals—a central practice of their faith. The majority of the Court chose to apply the narrow *Smith* test of free exercise, with little criticism or qualification of the test, and little effort to square its logic with that of earlier free exercise cases. Even under this narrow test, however, the Court could strike down the statute in question, for it was neither a general law, nor neutrally applied. It transparently targeted Santerian believers and practices for special prohibitions.

The effect of *Smith* has been further blunted by Congress's promulgation of the Religious Freedom Restoration Act (RFRA) in 1993.[260] The Act was specifically designed to repudiate the *Smith* approach to free exercise

256 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

257 For critical commentary, see Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118 (1993); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841 (1992); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

258 *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994); Berg, *supra* note 17; *The James R. Browning Symposium for 1994: The Religious Freedom Restoration Act*, 56 MONT. L. REV. 1 (1995).

259 508 U.S. 520 (1993).

260 Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993)).

analysis, and to restore the "compelling state interest" test of *Sherbert v. Verner* and *Wisconsin v. Yoder*. The Act provides in pertinent part:

> (a) In General. Government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except as provided in subsection (b) . . . .
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[261]

RFRA has evoked strong commentary by scholars and judges alike. Some defend it as the only sensible constitutional remedy to end the contemporary "crisis of religious liberty,"[262] and have put its provisions to immediate use. Others denounce the statute as a violation of the principle of separation of powers, and have urged that the common law method of adjudication based on earlier free exercise cases be used to draw the sting from *Smith*, and, if necessary, reverse it.[263] Such a deep-seated and fundamental constitutional issue will in due course have to come to the Supreme Court for resolution. Whether the Court, with the new appointments of Justices Ginsburg and Breyer, is ready to reconsider *Smith*, or to judge dispositively on the constitutionality of RFRA, is not at all clear. Whatever the outcome of this controversy, Congress's promulgation of RFRA and of several other laws governing religious freedom,[264] has provided the most sustained challenge in a half a century to the authority, and propriety, of the Supreme Court's governance of the American experiment in religious rights and liberties.

C. Modern Disestablishment Law

In the past half century, free exercise jurisprudence has moved from a multi-principled to a uni-principled reading of the "essential rights and liberties of religion" incorporated in the First Amendment. The trend in establishment clause jurisprudence has been the exact opposite. A single principle governed most of the early establishment clause cases; only recently has the Court considered seriously a more multi-principled approach.

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261 42 U.S.C. § 2000bb-1 (Supp. V 1993).

262 See especially the recent articles by the Act's principal draftsman, Douglas Laycock, *supra* notes 222 & 257-58; Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995); Laycock & Thomas, *supra* note 258; *see also* Flores v. City of Boerne, Texas, No. 95-50306, 1996 WL 23205 (5th Cir. Jan. 23, 1996) (upholding the constitutionality of RFRA).

263 *See* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under the Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994).

264 *See supra* note 16.

1. The Principle of Separationism

The single principle of separationism drove much of the Court's early analysis of the establishment clause. Justice Black announced this focus in the ringing dicta of *Everson*, the Court's first major establishment clause case:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."[265]

Justice Black, and Justice Rutledge in dissent in *Everson*, described these sentiments as the "original intent of the eighteenth century framers."[266] The historiography of both Justices, however, was at best highly selective. For, in determining the intent of the framers of the establishment clause, they turned only to enlightenment writers—principally Jefferson and Madison—and read primarily the constitutional history of Virginia, where these writers had their greatest influence. The Justices did not consider seriously the multiple opinions of Puritans, evangelicals, and civic republicans, nor the constitutional experiments or experiences of other early states besides Virginia. The Justices did not even consider the nuances of even the sternest enlightenment writers on religion, who were also concerned with other "essential rights and liberties" besides separationism. Henceforth, they declared, all federal and state laws and policies would have to abide by the principle of separationism or be struck down as unconstitutional.[267]

Everson was an open invitation to litigation. Numerous state and local policies on religion that were promulgated under a regime dominated by Puritan and republican sentiments and justified under sundry principles of religious rights and liberties, besides separationism, were now open to challenge. Scores of establishment cases poured into the lower federal courts after the 1940s. The subject matter of these cases was predictable enough: challenges to traditional laws and policies involving government endorsements of religious symbols and services; challenges to traditional laws and policies that afforded governmental aid to religious missions, schools, char-

265 Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).
266 *Id.* at 8-15, 33-43.
267 For a searching critique, see HOWE, *supra* note 144, ch. 1.

ities, and others; challenges to traditional laws explicitly predicated on (Protestant) Christian morals and mores. The new application of the First Amendment religion clauses to the states, through incorporation doctrine, encouraged such extensive litigation. The *Everson* Court's narrow separationist interpretation of the establishment clause demanded it.

The Court chose to enforce this separationist principle primarily in cases involving public school education.[268] Privately employed religious teachers could not hold classes in public schools.[269] Public schools could not maintain programs that required students to participate in daily prayer,[270] to receive daily instruction in the Bible,[271] or to hear recitation of the Lord's prayer.[272] Prohibitions against teaching an evolutionary theory, alongside a creation theory, of origins, could not be maintained.[273] The Court was not unwavering in its pursuit of separationism. Despite its strong separationist dicta, *Everson* itself upheld state policies of furnishing sectarian school children with public bus transportation. Later, the Court upheld policies that released religious students from public schools to participate in religious rituals,[274] and that furnished sectarian schools with textbooks on nonreligious subjects.[275]

2. The *Lemon* Test

In the landmark case of *Lemon v. Kurtzman* (1971), the Court cast this early separationist impulse into a constitutional test for all cases arising under the establishment clause—not just education cases.[276] Building on the *Walz v. Tax Commission* case of the previous term—which had upheld tax exemptions of church property in part because they fostered "separation of church and state"[277]—the Court declared that henceforth every government law challenged under the establishment clause would meet constitutional muster only if it could satisfy three criteria. The law must: (1) have a secular, legislative purpose; (2) have a primary result that neither advances nor inhibits religion; and (3) foster no excessive entanglement between church and state.[278] Incidental religious "effect" or modest "entanglement" of church and state was tolerable, but defiance of any of these criteria was constitutionally fatal.

This reification of the separationist principle rendered the establishment clause a formidable obstacle to many traditional forms and forums of collaboration between church and state in delivering education. Using this test, the Court disallowed state programs that provided salary and service

268 Indeed, 29 of the 40 plus Supreme Court cases heard under the establishment clause since *Everson* have involved questions of education.
269 Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).
270 Engel v. Vitale, 370 U.S. 421 (1962).
271 Abington Township Sch. Dist. v. Schempp, 374 U.S. 203 (1963).
272 Chamberlin v. Dade County Bd. of Pub. Instruction, 377 U.S. 402 (1964).
273 Epperson v. Arkansas, 393 U.S. 97 (1968).
274 Zorach v. Clauson, 343 U.S. 306 (1952).
275 Board of Educ. v. Allen, 392 U.S. 236 (1968).
276 403 U.S. 602 (1971).
277 397 U.S. 664 (1970).
278 *Lemon*, 403 U.S. at 612-13.

supplements to religious schools.[279] The Court struck down state programs that reimbursed religious schools for most costs incurred to administer standardized tests and to prepare state records[280]—although the "actual costs" for certain tests could be recouped.[281] The Court disallowed, with one narrow exception,[282] various state tax schemes that would allow for deduction or reimbursement for payments of religious school tuition.[283] The Court disallowed states from loaning or furnishing religious schools with textbooks, various supplies and films, and various counselling and other personnel, all of which were made mandatory by state policy.[284] The Court prohibited public schools to hold remedial educational programs to indigent children in classrooms leased from religious schools,[285] or to lease public personnel to teach remedial and enrichment courses in religious schools.[286] The Court prohibited public school policies of posting the Decalogue,[287] allowing student-led prayers,[288] or maintaining moments of silence for private prayer or meditation.[289] Very recently, the Court struck down a local school board practice of offering clergy-led prayers at a middle school graduation ceremony.[290] It also outlawed a state's creation of a single public school district within an exclusively Satmar Hasidic community.[291]

These establishment clause cases developed a general logic that was specific to the issue of the support of religion in public education. The public school is one of the most visible and well-known arms of the state in any community, the cases repeatedly argued. One primary purpose of the public school is to stand as a model of constitutional democracy, and to provide a vehicle for the communication of democratic values and abilities to its students. The state compels its students to be at schools; these students are perforce young and impressionable. As a consequence, the public schools must cling closely to core constitutional and democratic values. One such value is the consistent separation of church and state taught by the establishment clause. While some relaxation of constitutional values, even establishment clause values, might be possible in other public contexts—where mature adults can make informed assessments of the values being transmitted—public schools with their impressionable youths who are compelled to be there cannot afford such slippage. The constitutional

279 *Id.*

280 Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); *see also* New York v. Cathedral Academy, 434 U.S. 125 (1977).

281 Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

282 Mueller v. Allen, 463 U.S. 388 (1983).

283 Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); *see also* Sloan v. Lemon, 413 U.S. 825 (1973).

284 Meek v. Pittenger, 421 U.S. 349 (1975). For some exceptions, see Wolman v. Walter, 433 U.S. 229 (1977).

285 Aguilar v. Felton, 473 U.S. 402 (1985).

286 Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985).

287 Stone v. Graham, 449 U.S. 39 (1980).

288 Treen v. Karen B., 455 U.S. 913 (1982).

289 Wallace v. Jaffree, 472 U.S. 38 (1985).

290 Lee v. Weisman, 505 U.S. 577 (1992).

291 Board of Educ. v. Grumet, 114 S. Ct. 2481 (1994).

values contained in sources like the establishment clause must be rigorously protected.

3. Toward Multiple Principles

This prevailing logic of cases involving religion in public education did not prevent the Court from granting support for religious schools or students. In such cases, the argument that the public school must be a model and medium of democracy, which impressionable youths are forced to attend, does not readily apply. The Court thus upheld state policies that provided educational subsidies,[292] construction grants,[293] or other benefits[294] generically to religious and nonreligious institutions alike—so long as the benefits did not fall primarily to religious schools, or serve to subsidize religious activities. Nor was *Lemon* violated when state-supported disability services and benefits were afforded to students who attended religious schools.[295]

In some of these religious school cases, the Court applied rather tortured and tenuous logic to the *Lemon* test, yielding results that did not readily square with precedent. This was not just an exercise of disingenuity and result-oriented jurisprudence. What also seemed to be at work was that the Court was incrementally importing other "essential religious rights and liberties," besides separationism, into its establishment clause jurisprudence. State subsidies to religious schools, alongside others, protected equality and structural pluralism. State disability services to the sectarian school student preserved the voluntarism and the free exercise right to associate with others of one's faith. In the 1970s and thereafter, the Burger Court read into the *Sherbert* free exercise test an array of "essential rights and liberties." In this same period, the Court seemed to be applying the same eclectic interpretation to the *Lemon* establishment test.

The Court's inclination toward a more multi-principled reading of the establishment clause became bolder and clearer in cases not involving education. To be sure, the Court did use the *Lemon* test to strike down a state policy that effectively gave churches "veto" power over state decisions to grant liquor licenses to nearby establishments,[296] a state law guaranteeing a private sector employee the "absolute right" not to work on his Sabbath,[297] and a state law that granted sale and use tax exemptions exclusively to religious publications.[298] Even using a rigorous multi-principled reading of the establishment clause, the Court would have been hard-pressed to uphold the practices challenged in those cases. But, in the past decade, the Court has held that the *Lemon* test was not violated when Congress afforded church-affiliated counseling centers, along with others, funding to partici-

292 Roemer v. Board of Pub. Works, 426 U.S. 736 (1976).
293 Tilton v. Richardson, 403 U.S. 672 (1971).
294 Hunt v. McNair, 413 U.S. 734 (1973).
295 Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986); *see also* Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993).
296 Larkin v. Grendel's Den, 459 U.S. 116 (1982).
297 Estate of Thorton v. Caldor, 472 U.S. 703 (1985).
298 Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

pate in a federal family counseling program,[299] or when Congress exempted religious employers from full compliance with employment discrimination laws,[300] or when Congress granted public high school students equal access to school facilities to perform their religious activities after school hours.[301] These cases not only reflected the Court's growing deference to Congress and growing indifference to the rigors of the *Lemon* test;[302] they also reflected a growing appreciation for the principles of voluntarism, pluralism, and equality of religions before the law.[303]

In a few recent cases involving governmental use of religious services and symbols, the Court invoked these new principles without any pretense of using the *Lemon* test. In *Marsh v. Chambers* (1983), the Court upheld a state legislature's practice of sponsoring a chaplain and opening its sessions with prayer—overtly religious conduct and support, by any calculus.[304] Writing for the Court, Chief Justice Burger invoked civic republican arguments about the utility and validity of supporting features of a civil religion: "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion [but] simply a tolerable acknowledgement of beliefs widely held among the people of this country. . . . '[W]e are a religious people whose institutions presuppose a Supreme Being'."[305] *Lynch v. Donnelly* (1984)[306] extended this logic to uphold a municipality's traditional practice of maintaining a creche on a public park as part of a holiday display in a downtown shopping area. "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life," Chief Justice Burger argued, giving an ample list of illustrations. Our "constitutional underpinnings rest on and encourage diversity and pluralism in all areas." Moreover, the creche, while of undoubted religious significance to Christians, is merely a "passive" part of "purely secular displays extant at Christmas" that "engender a friendly community spirit of good will," "brings people into the central city and serves commercial interests and benefits merchants."[307] Such benign governmental support for religion cannot be assessed by "mechanical logic" or "absolutist tests" of establishment; "[i]t is far too late

299 Bowen v. Kendrick, 487 U.S. 589 (1988).

300 Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

301 Board of Educ. v. Mergens, 496 U.S. 226 (1990).

302 Today, in fact, the *Lemon* test is moribund, if not dead. *See* Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993); David O. Conkle, Lemon *Lives*, 43 CASE W. RES. L. REV. 865 (1993); *see also* Carl H. Esbeck, *The* Lemon *Test: Should it be Retained, Reformulated, or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513 (1990).

303 *Kendrick*, 487 U.S. at 607 (citing Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985)). For the use of "neutrality" as an organizing First Amendment principle, see Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

304 Marsh v. Chambers, 463 U.S. 783 (1983).

305 *Id.* at 792 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

306 Lynch v. Donnelly, 465 U.S. 668 (1984).

307 *Id.* at 685.

in the day to impose a crabbed reading of the [Establishment] Clause on the country."[308]

Free exercise law imploded in the 1990s. The *Smith* Court reduced the various principles and precedents of the *Sherbert* test to a simple neutrality principle, which Congress is now seeking to unmake. Establishment law, by contrast, has exploded. The Court has effectively replaced the *Lemon* test with a battery of new principles, which the Court is now struggling to integrate. Three principles—endorsement, coercion, and neutrality—have emerged as the most prominent and promising in the Court's recent establishment cases. None of these principles has as yet consistently captured a majority of the Court, but each seems to have attracted considerable support among the Justices.[309]

According to Justice O'Connor, the establishment clause forbids official endorsement of religion. "We live in a pluralistic society," Justice O'Connor writes. "Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all."[310] "[G]overnment may generally not treat people differently based on the God or gods they worship, or don't worship."[311] It may not

> make adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to insiders, favored members of the community."[312]

Governmental accommodations of religion, if indiscriminately applied, are acceptable. "What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief."[313] This endorsement principle invites a case-by-case weighing of the multiple principles incorporated in the establishment clause—and "depends on the hard task of judging" among competing principles in concrete cases.[314] Justice O'Connor has put this endorsement principle to work in several cases. Governmental support of religious sym-

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308 *Id.* at 678, 687. In County of Allegheny v. ACLU, 492 U.S. 573 (1989), the Court imposed limits on this sweeping rule, holding that a creche prominently displayed in a county court house, undiluted with other secular symbols, containing verbal religious messages, and with no obvious redeeming commercial value could not be countenanced. In the same case, however, it upheld display of a menorah that was located in a less public place of the county courthouse, was buffered by a Christmas tree, and had no verbal religious messages.

309 *See* Thomas C. Berg, *Slouching Towards Secularism: A Comment on* Kiryas Joel School District v. Grumet, 44 EMORY L.J. 433 (1995).

310 County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in judgment).

311 Board of Educ. of Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2497 (1994) (O'Connor, J., concurring in part and concurring in judgment).

312 Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

313 *Kiryas Joel*, 114 S. Ct. at 2497.

314 Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2525 (1995).

bols prominently displayed on its own buildings signals endorsement,[315] but modest governmental support of religious symbols in parks does not.[316] Governmental programs that give religious students equal access to state funding or facilities,[317] or that support the secular functions of religious organizations, or that accommodate the special core needs of religious individuals or groups are necessary protections against outright hostility to religion.[318] But equality and accommodation give way to endorsement when, as in *Kiryas Joel*, a public school district boundary follows exactly the boundary of an exclusively religious Satmar community. In such an instance, religion does affect a person's standing in the political community.[319]

According to Justice Kennedy, the establishment clause is violated only when government "coerce[s] anyone to support or participate in religion or its exercise, or otherwise act[s] in a way that 'establishes a state religion or religious faith, or tends to do so.'"[320] The establishment clause is thus designed principally to protect liberty of conscience,[321] not to purge the public square or public policy of all religion. "[P]reservation and transmission of religious beliefs and worship is [the] responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission," Justice Kennedy writes.[322] "Government policies of accommodation, acknowledgement or support for religion are an accepted part of our political and cultural heritage," and should be maintained in a pluralistic manner.[323] Only where such accommodations of religion effectively coerce public participation in religious exercises such as prayer (as in *Weisman*[324]), or merges "political and religious lines" and institutions (as in *Kiryas Joel*[325]) should they be struck down. Such governmental actions and policies invariably invite the kind of religious stigmatizing that impairs true liberty of conscience. Parties will choose to participate in the prayer or to abide by the religious line-drawing not out of voluntary conviction, but because of the civil and social advantages attached to them.

According to Justice Souter, the endorsement principle is not predictable enough in its balancing of principles, the coercion principle is not embracive enough to outlaw more subtle forms of religious discrimination, and the equality (nonpreferentialist) principle is not protective enough of nonreligion. In Justice Souter's view, the establishment clause mandates "governmental neutrality" among religions and between religion and

315 County of Allegheny v. ACLU, 492 U.S. 573, 623-37 (1989) (O'Connor, J., concurring in part and concurring in judgment).

316 *Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring).

317 Board of Educ. v. Mergens, 496 U.S. 226 (1990); *Rosenberger*, 115 S. Ct. at 2518.

318 *Rosenberger*, 115 S. Ct. at 2522.

319 Board of Educ. of Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2497 (1994) (O'Connor, J., concurring in part and concurring in judgment).

320 *Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch*, 465 U.S. at 678).

321 *See supra* note 143-44 (on Jefferson's comparable reading).

322 *Weisman*, 505 U.S. at 589.

323 *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in judgment in part, dissenting in part).

324 *Weisman*, 505 U.S. at 587.

325 *Kiryas Joel*, 114 S. Ct. at 2500 (Kennedy, J., concurring in judgment).

nonreligion.[326] This neutrality principle would outlaw a variety of forms of governmental accommodation of religion or cooperation with religious officials in the public school or the public square, for such actions would favor religion over nonreligion.[327] Religiously neutral policies that afford an incidental benefit to the religious beliefs or bodies are acceptable.[328] Governmental programs that support secular institutions along with religious institutions delivering secular services are also acceptable—so long as there is "a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter."[329] Direct funding with public money of any sectarian or religious activities, however, is "categorically prohibited," for taxpayers of either different or of nonreligious persuasion are being forced to pay for the religious activities of another.[330] "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed . . . indoctrination into the beliefs of a particular religious faith."[331]

Each of these readings of the establishment clause can find some anchor in establishment clause precedents and in eighteenth century writings. Justice Souter's neutrality reasoning, for example, largely repeats the "equal protection" argument first popularized by Philip Kurland in 1962,[332] crystallized shortly thereafter by the Supreme Court, and defended ably by a variety of commentators to this day.[333] But the neutrality principle ultimately depends for its efficacy on easy distinctions between sectarian and secular, belief and act, private and public dimensions of religion that have proved to be both theologically fallacious and sociologically false.[334] In Justice Souter's formulation of it, the principle demands a level of governmental blindness to religion that simply cannot be squared with the demands of the free exercise clause to accommodate and protect religious beliefs and practices.[335] Moreover, Justice Souter's argument for neutrality imputes to the framers an exaggerated concern for "nonreligion" in their formulation of the establishment clause. The framers were, indeed, concerned to protect nonreligious and religious persons alike

326 *See Kiryas Joel*, 114 S. Ct. at 2487-88; Church of Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2240 (1993) (Souter, J., concurring).

327 See Justice Souter's illustrations in *Weisman*, 505 U.S. at 618-19; and *Kiryas Joel*, 114 S. Ct. at 2488.

328 *Kiryas Joel*, 114 S. Ct. at 2491.

329 Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2539 (1995).

330 *Id.*

331 *Id.* (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985)).

332 *See* PHILIP KURLAND, RELIGION AND LAW (1962).

333 *See* Walz v. Tax Comm'r, 397 U.S. 664 (1970). For a searching analysis of the neutrality principle, see Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373 (1992).

334 *See, e.g.*, FREDERICK M. GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 25-80 (1995); STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN POLITICS AND LAW TRIVIALIZE RELIGIOUS DEVOTION (1993); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Life and Law*, 36 BUFF. L. REV. 237 (1987); *see also supra* notes 183-87 & 202 and accompanying text (discussing a dualistic belief versus act line-drawing in free exercise jurisprudence).

335 *See* McConnell, *Accommodation of Religion*, *supra* note 104; Arlin M. Adams & Sarah B. Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DEPAUL L. REV. 317 (1988).

from general tax assessments and other coerced financial payments for religious worship and other sectarian activities.[336] But coerced tax support for religion was only one evil that the establishment clause was designed to outlaw. And this was the only instance where eighteenth century writers on religious rights were particularly solicitous of the nonreligious person. The framers' primary concern in crafting the establishment clause was to ensure equality not between religion and nonreligion but among religions. It was to protect liberty of conscience for all religious individuals and equality of organization and activities for all religious bodies.[337]

Justice O'Connor's "no endorsement" approach is perhaps the most suggestive and original of the Court's latest establishment clause offerings. Her approach derives, in part, from cases interpreting the *Lemon* test's concern to strike down policies with a "primary religious effect."[338] It also derives in part from the founders' concerns to place multiple principles around the cherished realm of religion. Justice O'Connor's early formulations of this approach have been properly criticized for inviting judicial inquiry into an elusive "legislative intent respecting religion," and for substituting judicial analysis of the constitutionality of governmental action with the "perceptions" of a "reasonable" or "objective observer."[339] But inquiries into "legislative intent" and the "objective observer" have quietly disappeared from Justice O'Connor's latest establishment clause opinions.[340] Moreover, though a troublesome streak of subjectivism continues to plague this approach, it does inject a healthy dose of moderation and principled equity into First Amendment jurisprudence—a measure of "artificial reason,"[341] as Sir Edward Coke once put it. Particularly in recent cases, Justice O'Connor has repeatedly called the Court to an equitable balancing of the multiple principles embodied in the establishment clause. Ironically, this approach stands in marked contrast to her insistence on a wooden "single-principled" reading of the free exercise clause.[342] To import a similar measure of principled equity into interpretation of the free exercise clause might well put the Court on its way to what Justice O'Connor has long sought—"a solution to the tension between the religion clauses."[343]

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336 *See supra* note 131 and accompanying text; *see also* Laycock, *supra* note 333, at 376; Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2535-37 (1995) (Souter, J., dissenting).

337 *See supra* notes 149-58 and accompanying text.

338 *See* County of Allegheny v. ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

339 *See, e.g.*, Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987).

340 *See, e.g., Rosenberger*, 115 S. Ct. at 2526 (including only a passing quotation about the "reasonable observer"); Board of Educ. v. Mergens, 496 U.S. 226, 283 (1990) (rejecting inquiry into legislative intent, and not referring to the "reasonable observer" standard).

341 *See* John Underwood Lewis, *Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, 84 L.Q. REV. 330 (1968).

342 *See supra* notes 251-54 and accompanying text.

343 Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

III. An Integration of the Essential Rights and Liberties of Religion

A. *The Need for Integration*

The vacillations in the Supreme Court's interpretations of the establishment and free exercise clauses can be explained, in part, on factual grounds. The Court's application of a cryptic constitutional clause to a diverse set of complex issues over the course of fifty odd years has inevitably led to conflicting lines of interpretation. "The life of the law has not been logic: it has been experience," Oliver Wendell Holmes reminds us.[344] The law of religious rights and liberties in America is no exception.

These vacillations, however, also betray the failure of the Court to develop a coherent and comprehensive framework for interpreting and applying the religion clauses. The Court has tended to rely too heavily on its mechanical tests of free exercise and establishment, and to use these tests as a substitute, rather than as a guide, to legal analysis. The Court has tended to pit the establishment and free exercise clauses against each other, rather than treating them as twin guarantees of religious rights and liberties. The Court has been too eager to reduce the religion clauses to one or two principles, often thereby ignoring the range of interlocking principles that were originally incorporated into the First Amendment.

The Court needs to develop an integrated approach to First Amendment questions that incorporates the first principles of religious rights and liberties on which the American experiment was founded, and integrates them into the resolution of specific cases. Such a framework is easy enough to draw up in the sterility of the classroom, or on the pages of a law review article. In the context of the ongoing constitutional experiment in religious liberty—with the thickly entangled work of federal and state courts and legislatures—deliberate and provisional steps are essential to reaching any type of new framework or synthesis. It might well be necessary, at least as an interim step, that certain lines of cases simply continue. Individual subjects raising questions of religious rights and liberties, such as income and property taxation,[345] labor relations,[346] intrachurch disputes,[347] among others might need to be left for a time to develop their own integrated pockets of principles, precepts, and precedents—without pretending to project them into other areas of religious liberty law. Religious incorporation, zoning, landmark preservation, and related subjects that generally fall within state (not federal) jurisdiction[348] might need to

344 Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

345 *See* Witte, *Tax Exemption of Church Property*, *supra* note 72.

346 *See* Lupu, *The Lingering Death of Separatism*, *supra* note 200; Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981).

347 *See* sources *supra* note 235.

348 *See* Kauper & Ellis, *supra* note 60; Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill. L. Rev. 401 (1981); Angela C. Carmella, *Landmark Preservation of Church Property*, 34 Cath. Law. 41 (1991); Angela C. Carmela, *Liberty and Equality: Paradigms for the Protection of Religious Property Use*, 37 J. Church & St. 573 (1995); Laurie Reynolds, *Zoning the Church: The Police Power Versus the First Amendment*, 64 B.U. L. Rev. 767 (1985).

remain "selectively unincorporated" for a time and left to the experimentation of state legislatures and courts. Recent imports into the Court's conceptual constellation, such as "equal access"[349] and "substantive neutrality,"[350] should be permitted to leaven the jurisprudence a bit longer. Religion clause jurisprudence should build stronger conceptual bridges with other clauses of the First Amendment, and even other amendments in the Bill of Rights. There is great wisdom in Justice O'Connor's cautionary admonition in *Kiryas Joel:*

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that might arise under a particular [First Amendment] clause. . . . But the same constitutional principle may operate very differently in different contexts. . . . And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless. . . . I think a less unitary approach provides a better structure for analysis. If each test covers a narrower and more homogeneous area, the tests may be more precise and therefore easier to apply. . . . Perhaps eventually under this structure we may indeed distill a unified, or at least a more unified [approach].[351]

Whatever interim steps are taken, the Court—with the help of Congress, state governments, and the academy—must eventually strive toward the achievement of this "more unified approach." Such an approach could come in a variety of forms—through another grand synthetic case in the series of *Watson, Cantwell, Everson, Sherbert,* and *Lemon* or through comprehensive statutes, restatements,[352] codes, or even constitutional amendments.[353] Such an approach must certainly embrace "the longstanding traditions of our people," as Justice Scalia urged in response to Justice O'Connor's opinion in *Kiryas Joel*[354]—traditions that are best captured in the roll of "essential rights and liberties" incorporated into the First Amendment. Such an approach might well also consider the traditions of *other* people—traditions that are today captured in several human rights instruments of public international law. The way of integration is not only the way of the past, the original intent of the framers of the religion clauses. It is also the way of the future, the intent of the emerging interna-

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349 *See* sources cited *supra* notes 229-31.

350 *See* Laycock, *supra* note 303.

351 *Kiryas Joel,* 114 S. Ct. at 2498-500 (O'Connor, J., concurring in part and concurring in judgment); *see also Rosenberger,* 115 S. Ct. at 2525-28 (O'Connor, J., concurring) ("Reliance on categorical platitudes is unavailing. . . . When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified.").

352 For provocative prototypes, see Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?,* 70 NOTRE DAME L. REV. 581 (1995); JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES OF JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995). For an earlier effort, see THE WILLIAMSBURG CHARTER: A NATIONAL CELEBRATION OF THE FIRST AMENDMENT RELIGIOUS LIBERTY CLAUSES (June 25, 1988), *reprinted in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 123 (James Davison Hunter & Os Guinness eds., 1990). *See also Symposium on the Williamsburg Charter,* 8 J.L. & RELIGION 1 (1990).

353 *See* sources cited *supra* note 180 (regarding attempts at religious liberty amendments).

354 *Kiryas Joel,* 114 S. Ct. at 2515 (Scalia, J., dissenting).

tional and world legal system, of which American constitutional law will eventually have to be a part.

B. International Human Rights Law as a Source of Integration

Resort to international laws of human rights might seem to be an unlikely course for achieving a "more unified approach" to the First Amendment.[355] Not only are we better at exporting our constitutional ideas and institutions than importing those of other peoples. But the budding international law on religious rights and liberties seems, by conventional wisdom, to have little that is worth importing. The canon of applicable international norms has developed only slowly and sporadically since World War II.[356] Even as more fully developed in the 1980s and 1990s, this international law is often seen to affect America's foreign diplomatic relations, not its domestic constitutional law.[357] Comparatively few international cases have been adjudicated, and those that have been reported do not follow the conventional forms and format of American constitutional law.[358] The international law of religious rights and liberties would thus seem to be properly left outside the ambit of the First Amendment.

But to keep this parochial veil drawn shut is to deprive the American experiment of a rich source of instruction and inspiration. Especially at this time of turmoil and transition in First Amendment law, comparative legal analysis might well be salutary. There are several distinctive principles of international law that would confirm, refine, integrate, and elaborate prevailing First Amendment principles and cases. There is much to be learned from international and comparative constitutional practices that differ from our own. The refined hermeneutical principles of case and statutory analysis at work in other nations might well be used to reform the somewhat chaotic common law case method at work in this country.[359] The prioritizing of liberty of conscience, free exercise, and equality principles at international law might well serve as a prototype for the integration of free exercise and establishment clause values.[360] The insistence of international tribunals that any state abridgements of religious rights and liberties be "necessary" and "proportionate" is highly suggestive for our free exercise jurisprudence. The heavy emphasis on group religious rights in

355 For illustrations of attempts to introduce it into American law, see, e.g., W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism and the Transformative Dimension of Religious Institutions*, 1993 B.Y.U. L. Rev. 421.

356 For a masterful summary, see Natan Lerner, *Religious Human Rights Under the United Nations*, *in* Religious Human Rights in Global Perspective: Legal Perspectives 79-134 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) [hereinafter van der Vyver & Witte eds., Religious Human Rights: Legal Perspectives].

357 *See, e.g.*, John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DePaul L. Rev. 1 (1986); J. Bruce Nichols, The Uneasy Alliance (1988).

358 On the prevailing statutory and case law of the European community, see T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, *in* van der Vyver & Witte eds., Religious Human Rights: Legal Perspectives, *supra* note 356, at 305-30.

359 For a good illustration, see Lourens M. DuPlessis, *Religious Human Rights in South Africa*, *in* van der Vyver & Witte eds., Religious Human Rights: Legal Perspectives, *supra* note 356, at 441-66 (offering a refined "hermeneutical strategy" to interpret new provisions on religious liberty in the South African constitution).

360 *See also infra* notes 367-71 & 374.

recent international instruments might provide greater protection to religious minorities in America.[361] The ready merger of constitutional and civil rights of religion in many legal systems today might prompt us to try to bridge at least some of the gaps between constitutional and statutory protections of religious rights. The international doctrine of "a margin of appreciation" for local religious practices[362] could be put to good use in our federalist system of government with its local jury trials. The eventual resolution of the international debate between "universalism versus relativism" in human rights[363] has profound implications for the distinctive American debate concerning federal and state jurisdiction over religious rights.

1. Religious Rights and Liberties at International Law

Three international legal instruments contain the most critical protections of religious rights and liberties: (1) the International Covenant on Civil and Political Rights (1966) (the 1966 Covenant);[364] (2) the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) (the 1981 Declaration);[365] and (3) the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe that was promulgated in 1989 (the Vienna Concluding Document).[366] Viewed collectively, these three documents confirm most of the "essential rights and liberties" of religion embodied in the American experiment, but prioritize them quite differently.

The 1966 Covenant repeats the capacious guarantee of religious rights and liberties, first announced in the 1948 Universal Declaration of Human Rights. Article 18 reads:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.

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361 On group rights at international law, see Lerner, *supra* note 356 and Dinah Shelton & Alexandre Kiss, *A Draft Model Law on Freedom of Religion, With Commentary*, *in* van der Vyver & Witte eds., RELIGIOUS HUMAN RIGHTS: LEGAL PERSPECTIVES, *supra* note 356, at 559-92. On implications of this law for the United States, see W. Cole Durham, Jr., *Treatment of Religious Minorities in the United States*, *in* THE LEGAL STATUS OF RELIGIOUS MINORITIES IN THE COUNTRIES OF THE EUROPEAN UNION 323 (European Consortium for Church-State Research, 1994).

362 *See generally* Clovis C. Morrisson, Jr., *Margin of Appreciation in European Human Rights Law*, 6 REVUE DES DROITS DE L'HOMME 263 (1973).

363 *See* Abdullahi Ahmed An-Na'im et al., *Universality vs. Relativism in Human Rights*, *in* RELIGION AND HUMAN RIGHTS 31-59 (John Kelsay & Sumner B. Twiss eds., 1994).

364 *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter *1966 Covenant*].

365 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1982) [hereinafter *1981 Declaration*].

366 *Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-Up to the Conference*, Jan. 17, 1989, 28 I.L.M. 527 [hereinafter *Vienna Concluding Document*].

> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 18 distinguishes between the right to freedom of religion and the freedom to manifest one's religion—what we normally call liberty of conscience and free exercise of religion, respectively. The right to freedom of religion—the freedom to have, alter, or adopt a religion of one's choice—is an absolute right from which no derogation may be made and which may not be restricted or impaired in any manner. Freedom to manifest or exercise one's religion—individually or collectively, publicly or privately—may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The latter provision is an exhaustive list of the grounds allowed to limit the manifestation of religion. Legislatures may not limit the manifestation of religion on any other grounds.[367] Moreover, the requirement of necessity implies that any such limitation on the manifestation of religion must be proportionate to its aim to protect any of the listed interests; such limitation must not be applied in a manner that would vitiate the rights guaranteed in Article 18. Finally, the power to limit the manifestation of religion may not be used for purposes other than those for which that power has been given.[368] Limitations that have as their purpose the protection of morals must be based on principles not deriving exclusively from a single tradition.[369]

Articles 2 and 26 of the 1966 Covenant require equal treatment of all persons before the law and prohibit discrimination based, among other things, on religion. According to international case law, unequal treatment of equal cases is allowed only if that treatment serves an objective and reasonable purpose and the inequality is proportionate to that purpose.[370]

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367 *See* Lerner, *supra* note 356, at 91-93; Karl Josef Partsch, *Freedom of Conscience and Expression and Political Freedoms, in* THE INTERNATIONAL BILL OF RIGHTS 209 (Louis Henkin ed., 1981); Alexandre C. Kiss, *Permissible Limitations on Rights, in* THE INTERNATIONAL BILL OF RIGHTS 290 (Louis Henkin ed., 1981).

368 *1966 Covenant, supra* note 364, art. 4(3).

369 *See* U.N. GAOR Hum. Rts. Comm., General Comment No. 22(48) concerning Article 18, U.N. Doc. CCPR/C/21/Rev.1/Add. 4 (1993) [hereinafter Human Rights Committee, General Comment No. 22(48)]; *see also* W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework, in* van der Vyver & Witte eds., RELIGIOUS HUMAN RIGHTS: LEGAL PERSPECTIVES, *supra* note 356, at 1, 25-36 (similarly interpreting the comparable language of Article 9 of the European Convention on the Protection of Human Rights and Freedoms).

370 *See, e.g., Communication No. 172/1984, S.W.M. Broeks v. The Netherlands*, U.N. GAOR Hum. Rts. Comm., 29th Sess., Supp. No. 40, at 139 U.N. Doc. A/42/40 (1987) (expressing the view of the U.N. Human Rights Committee in *S.W.M. Broeks v. The Netherlands*).

The Human Rights Committee, established under the 1966 Covenant, has made it explicit in its General Comment No. 22(48) concerning Article 18 that:

> The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.[371]

In its General Comment the Human Rights Committee has further clarified that the freedom to manifest one's religion

> includes acts integral to the conduct by religious groups of their basic affairs, such as, *inter alia*, the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[372]

The 1981 Declaration elaborated what the 1966 Covenant adumbrated.[373] The Declaration includes (1) prescriptions of religious rights for individuals and institutions; (2) proscriptions on religious discrimination, intolerance, or abuse; (3) provisions specific to the religious rights of parents and children; and (4) explicit principles of implementation. Like the 1966 Covenant, the 1981 Declaration on its face applies to "everyone," whether "individually or in community," "in public or in private."

Articles 1 and 6 of the 1981 Declaration set forth a lengthy catalogue of "rights to freedom of thought, conscience, and religion"—illustrating more concretely the ambit of what we would call "liberty of conscience" and "free exercise of religion." Such rights include the right (1) to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; (2) to establish and maintain appropriate charitable or humanitarian institutions; (3) to make, to acquire, and to use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; (4) to write, to publish, and to disseminate relevant publications in these areas; (5) to teach a religion or belief in places suitable for these purposes; (6) to solicit and receive voluntary financial and other contributions from individuals and institutions; (7) to train, to appoint, to elect, or to designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; (8) to observe days of rest and to celebrate holy days and ceremonies in accordance with the precepts of one's religion or belief; and (9) to estab-

371 Human Rights Committee, General Comment No. 22(48), *supra* note 369.

372 *Id.*

373 The following paragraphs are adapted from W. Cole Durham et al., *The Future of Religious Liberty in Russia: Report of the De Burght Conference on Pending Russian Legislation Restricting Religious Liberty*, 8 EMORY INT'L L. REV. 1, 17-20 (1994).

lish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Like the 1966 Covenant, the 1981 Declaration allows the manifestation of religion to be subjected to appropriate state regulation and adjudication. The 1981 Declaration permits states to enforce against religious individuals and institutions general regulations designed to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. It is assumed, however, that in all such instances, the grounds for such regulation are enumerated and explicit, and such regulations abide by the international legal principles of proportionality and necessity.

The 1981 Declaration includes more elaborate provisions concerning the religious rights of children and their parents. It guarantees the right of parents or guardians to organize life within the family and to educate their children in accordance with their religion or beliefs. Such parental responsibility, however, must be discharged in accordance with the "best interests of the child." At minimum, the parents' religious upbringing or education "should not be injurious to his physical or mental health or to his full development." Although the drafters debated at length the potential conflicts between the parent's right to rear and educate their children in accordance with their religion and the state's power to protect the best interests of the child, they offered no specific principles to resolve these disputes. Presumably, different systems will be afforded a "margin of appreciation" in this area.

The 1981 Declaration includes suggested principles of implementation and application of these guarantees. It urges states to take all "effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life." It urges states to remove local laws that perpetuate or allow religious discrimination, and to enact local criminal and civil laws to combat religious discrimination and intolerance.

The 1989 Vienna Concluding Document extends these norms, and their implementation, particularly for religious groups. Principles 16 and 17 provide a clear distillation of principles that is worth quoting in full:

> 16. In order to ensure the freedom of the individual to profess and practice religion or belief the participating States will, inter alia,
> (a) take effective measures to prevent and eliminate discrimination against individuals or communities, on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and ensure the effective equality between believers and nonbelievers;
> (b) foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and nonbelievers;
> (c) grant upon their request to communities of believers, practising or prepared to practise their faith within the constitutional framework of their states, recognition of the status provided for them in their respective countries;

(d) respect the right of religious communities to establish and maintain freely accessible places of worship or assembly, organize themselves according to their own hierarchical and institutional structure, select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State, solicit and receive voluntary financial and other contributions;
(e) engage in consultations with religious faiths, institutions and organizations in order to achieve a better understanding of the requirements of religious freedom;
(f) respect the right of everyone to give and receive religious education in the language of his choice, individually or in association with others;
(g) in this context respect, *inter alia*, the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions;
(h) allow the training of religious personnel in appropriate institutions;
(i) respect the right of individual believers and communities of believers to acquire, possess, and use sacred books, religious publications in the language of their choice and other articles and materials related to the practice of religion or belief;
(j) allow religious faiths, institutions and organizations to produce and import and disseminate religious publications and materials;
(k) favorably consider the interest of religious communities in participating in public dialogue, inter alia, through mass media.

17. The participating States recognize that the exercise of the abovementioned rights relating to the freedom of religion or belief may be subject only to such limitations as are provided by law and consistent with their obligations under international law and with their international commitments. They will ensure in their laws and regulations and in their application the full and effective implementation of the freedom of thought, conscience, religion or belief.

2. International and American Laws Compared

These international legal instruments are not formally binding law on the United States. They are not "incorporated" into American constitutional law, and can be ignored with legal (though perhaps not always with diplomatic) impunity. Nonetheless, as collective expressions of world opinion on the subject, they carry ample moral and intellectual suasion, and anticipate at least some of the cardinal principles of the budding world legal order. This is not the place for an exhaustive analysis of American case law against international human rights standards. But a few general comparisons between these two traditions might be profitably made to suggest new ways to develop a "unified framework" for the First Amendment.

International human rights law both confirm and prioritize several of the "essential rights and liberties of religion" that have long been part of the American experiment. The principles of liberty of conscience, individual and corporate free exercise of religion, and equality of religions before

the law form the backbone of the international law of religious rights and liberties. Liberty of conscience, with its inherent protections of voluntarism and against noncoercion, are absolute rights from which no derogation can be made. The manifestation or exercise of religion can be regulated only to protect either other fundamental rights or public health, safety, and welfare and only when the religious intrusion is "proportionate" to achieving that narrowly stated need. Equality of religions before the law is not only to be protected but to be affirmatively fostered by the state in all dimensions of social living. To achieve the mandated goals of equality and nondiscrimination on grounds of religion, exemptions from generally applicable laws and policies are sometimes necessary, as are affirmative state actions to protect religions or to undo past religious repression.[374]

International human rights law assume a vast pluralism of confessions and faiths. Multiple forms of religious belief and expression are deserving of special religious rights protection—whether ancient or new, individual or communal, internal or external, private or public, permanent or transient. The special religious functions of parents, teachers, and clerics are given particular attention and protection at international law. The rights of religious minorities and nontraditional religions are given special weight, and states are obligated to be particularly solicitous of their peculiar needs.

Particularly the Vienna Concluding Document also protects the principle of structural pluralism, and the basic autonomy of various religious organizations that is assumed in the American principle of separation of the institutions of church and state. Religious associations have rights to function in expression of their founding religious beliefs and values, which the state cannot compromise except on stated grounds that are necessary and proportional. Churches, temples, mosques, tribes, and other religious groups thus have rights to organize, assemble, worship, and enforce certain religious laws. Parents and families have rights to rear, educate, and discipline children in expression of their religious convictions. Religious publishers and suppliers have rights to produce the particular products needed for their religious cultus. Religious schools have rights to educate and discipline children in accordance with the basic norms and habits of their religious traditions.

Conspicuously absent from international human rights instruments are the more radical demands for separationism, rooted in certain forms of American enlightenment reasoning and reified in the popular American metaphor of a "wall of separation." *Everson*, *McCollum*, *Engel* and other early establishment cases assumed that religious liberty requires the separation of church and state, and the cessation of state support for religion.

374 This "affirmative religious action" by states is especially advocated by Eastern European and African writers. *See* Harold J. Berman, *Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory*, *in* van der Vyver & Witte eds., RELIGIOUS HUMAN RIGHTS: LEGAL PERSPECTIVES, *supra* note 356, at 285; Tamás Földesi, *The Main Problems of Religious Freedom in Eastern Europe*, *in* van der Vyver & Witte eds., RELIGIOUS HUMAN RIGHTS: LEGAL PERSPECTIVES, *supra* note 356, at 243; Makau wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, *in* van der Vyver & Witte eds., RELIGIOUS HUMAN RIGHTS: LEGAL PERSPECTIVES, *supra* note 356, at 417.

Only the secular state can guarantee religious liberty, it was argued, and only separation can guarantee its neutrality on religious matters. Such separationist logic is not widely shared around the world, nor reflected in international human rights instruments. International law and many domestic laws regard the material and moral cooperation of church and state as conducive, and sometimes essential, to the achievement of religious liberty. Indeed, today a number of religious groups in the former Soviet bloc and sub-Saharan Africa regard restitution and affirmative state action towards religion as a necessary feature of any religious rights regime—if nothing else, to undo and overcome past confiscation and repression.[375] Similarly, some Catholic groups in Latin America urge cooperation of religious and political bodies to preserve the "Catholicization" of public life and culture.[376] Islamic revivalists in various countries urge similar arrangements to enhance the "Islamicization" of the community.[377] Jewish groups argue similarly to protect the Jewish character of the State of Israel.[378] Absolute separationists in this country have fewer allies abroad than is conventionally assumed.

If applied in the United States, the international law on liberty of conscience would confirm the "compelling state interest" test anticipated in *Cantwell*, *Barnette*, and their early progeny and distilled in *Sherbert*, *Yoder*, and the Religious Freedom Restoration Act.[379] It would confirm the "noncoercion" reading of the establishment clause reflected most recently in *Lee v. Weisman*. It would confirm the multiple forms of religious accommodation for individual believers upheld under both religion clauses and in various statutes. Conversely, the international principle that liberty of conscience is a nonderogable right runs directly counter to the wooden reading of the free exercise clause introduced in the late nineteenth century Mormon polygamy cases—*Reynolds*, *Davis*, and *Latter Day Corporation*[380]—and resurrected this past decade in *Lyng*, *Smith* and their lower court progeny.[381]

The international law on equality would applaud the "equal access" cases from *Widmar* to *Rosenberger* as necessary protections of equality.[382] It would confirm the various statutes, regulations, and cases that foster religious equality in the workplace, the school, and in public facilities. It would likewise uphold the application of general taxing, licensing, parad-

375 *See, e.g.*, Irwin Cotler, *Jewish NGOs and Religious Human Rights: A Case Study*, *in* Witte & van der Vyver eds., RELIGIOUS HUMAN RIGHTS: RELIGIOUS PERSPECTIVES, *supra* note 3, at 235; Földesi, *supra* note 374; Mutua, *supra* note 374; Martin Heckel, *The Impact of Religious Rules on Public Life in Germany*, *in* van der Vyver & Witte eds., RELIGIOUS HUMAN RIGHTS: LEGAL PERSPECTIVES, *supra* note 356, at 191.

376 *See, e.g.*, Paul E. Sigmund, *Religious Human Rights in Latin America*, *in* van der Vyver & Witte eds., RELIGIOUS HUMAN RIGHTS: LEGAL PERSPECTIVES, *supra* note 356, at 467.

377 *See* Said Arjomand, *Religious Human Rights and the Principle of Legal Pluralism in the Middle East*, *in* van der Vyver & Witte eds., RELIGIOUS HUMAN RIGHTS: LEGAL PERSPECTIVES, *supra* note 356, at 331.

378 *See* Cotler, *supra* note 375; Asher Maoz, *Religious Human Rights in the State of Israel*, *in* van der Vyver & Witte eds., RELIGIOUS HUMAN RIGHTS: LEGAL PERSPECTIVES, *supra* note 356, at 349.

379 *See supra* notes 202-47 and accompanying text.

380 *See supra* notes 182-87 and accompanying text.

381 *See supra* notes 249-58 and accompanying text.

382 *See supra* notes 229-31 and accompanying text.

ing, reporting, land use, and other statutes and regulations to religious bodies, finding no ready violation of free exercise rights if such regulations are equally applied to all. Conversely, international law would have little patience with the patently discriminatory treatment of certain religious minorities in America. The Court's failure to accommodate the distinctive theology of polygamous marriage among Mormons,[383] the special sabbatarian needs of Jews,[384] the religious worship patterns of Muslims,[385] and the site-specific and nontraditional rituals of native Americans[386] would run directly counter to the cardinal principle of equality and nondiscrimination mandated by several international instruments.

The international principle of structural pluralism would endorse the lines of cases protecting the forms and functions of religious bodies, whether worship centers, religious schools, charities, publishing houses, and others. Cases upholding general regulations of these bodies in furtherance of health, safety, and welfare, and in exercise of taxing and police power would likewise pass muster. Similarly cases upholding generically available governmental support for religion—in the form of tax exemptions, tax subsidies, or equal access to public facilities would find ready support in the principle of structural pluralism. The principle of structural pluralism, especially as elaborated in the Vienna Concluding Document, would look askance, however, at a case like *Jones v. Wolf*, which permitted government resolution of intrachurch disputes involving "neutral principles" of law. The "deference test" of *Watson*, *Kedroff*, and *Milivojevich* and its progeny, and the corporate free exercise rights over religious polity and policy reflected in *Amos* would be more sensitive to the principle of structural pluralism.[387] This principle might also look askance at a case like *Bob Jones University v. United States*[388] that withheld tax exempt status to a religious university that discriminated on race in its matriculation and employment decisions on the basis of its religious convictions.[389] International law would protect even unpopular and prejudicial policies of a religious body that are firmly grounded and sincerely held—so long as such policy did not threaten or violate the life or limb of its members, or impair any party's liberty of exit from the religious body.[390]

The absence of a principle of "disestablishment" at international law would not call into question the entire line of establishment clause cases. Many of these cases, as we have seen, serve to protect the principles of liberty of conscience, equality, and pluralism in a manner consistent with prevailing international norms. But when there is a "clash" between such

383 *See supra* notes 182-87 and accompanying text; *see also* Cleveland v. United States, 329 U.S. 14 (1946) (upholding federal ban on transporting plural wives across state boundaries).

384 *See supra* note 227.

385 O'Lone v. Estate of Shabbaz, 482 U.S. 342 (1987).

386 *See supra* notes 251-58 and accompanying text.

387 Jones v. Wolf, 443 U.S. 595 (1979); *see supra* notes 194-95, 217-18 & 232-35 and accompanying text.

388 461 U.S. 574 (1983).

389 *See* Lerner, *supra* note 356, at 103-06. But such discrimination, even on religious grounds, might well run afoul of the international Declaration and Convention on Racial Discrimination.

390 *See generally* NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION AT INTERNATIONAL LAW (1991).

principles and concerns for religious establishment, international law would give preference to the former—as do many American cases upholding the principle of accommodation.[391] Moreover, the realm of education—where parental religious rights and preferences receive especially strong protection at international law—is not the ideal place for undue zealotry in the purging of religion and the pursuit of secularism. To be sure, international law would not countenance any more than American law coerced religious exercises in school classrooms—such as mandatory participation in prayers, pledges, confessions of faith, Bible reading, and the like—even against countervailing parental preferences.[392] But the Supreme Court's purging of tax-supported schools of virtually all religious symbols, texts, and traditions—in favor of "purportedly neutral and secular" tropes—stands in considerable tension with international principles of religious equality and of parental religious rights.

Finally, the absence of a universal definition, or common method of defining, religion in American law would meet with harsh criticism at international law. The current system of leaving such definitions to individual states and statutes, courts and agencies has introduced a bewildering array of definitions of "religion." Some courts and legislatures make a simple "common sense" inquiry as to the existence of religion. Others defer to the good faith self-declarations of religion by the claimant. Others seek to find sufficient analogies between existing religions and new religious claimants. Others insist on evidence of a god or something transcendent that stands in the same position as a god. Others analyze the motives for formation of the religious organization or adoption of a religious belief, the presence and sophistication of a set of doctrines explicating the beliefs, the practice and celebration of religious rites and liturgies, the degree of formal training required for the religious leaders, the strictures on the ability of members to practice other religions, the presence and internal enforcement of a set of ethical rules of conduct, and other factors.[393] All this results in considerable inequality and discriminatory treatment of religious claims and claimants.

We need not necessarily adopt the capacious definition of religion set out in international human rights instruments—particularly given that, in American law, one definition of religion must be usefully applied in both religion clauses. But the term "religion" must be assigned some consistent boundaries to be useful at least for a constitutional rights regime. No universal definition can easily embrace every religious dimension of modern culture. No bright line tests can readily resolve all penumbral cases. Fairness commands as broad a legal definition of religion as possible, so that no legitimate religious claim is excluded. Prudence counsels a narrower definition, so that not every claim becomes religious (and thus no claim becomes deserving of special religious rights protection). To define "religion" too closely is to place too much trust in the capacity of the lexicon or

391 *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987); Thomas v. Review Bd., 450 U.S. 707, 719-20 (1981); Widmar v. Vincent, 454 U.S. 263, 270-75 (1981); Sherbert v. Verner, 374 U.S. 398, 409-10 (1963).

392 *See supra* notes 268-73 & 279-91 and accompanying text.

393 *See* Witte, *supra* note 72, at 402-07.

the legislature. To leave the term undefined is to place too much faith in the self-declarations of the claimant or the discernment of local judges and administrators.

In my view, the functional and institutional dimensions of religion deserve the strongest emphasis in defining the constitutional realm of religious rights and liberties in America. Of course, religion viewed in its broadest terms embraces all beliefs and actions that concern the ultimate origin, meaning, and purpose of life, of existence. It involves the responses of the human heart, soul, mind, conscience, intuition, and reason to revelation, to transcendent values, to, what Rudolf Otto once called, the "idea of the holy."[394] But such a definition applied at modern constitutional law would render everything (and thus nothing) deserving of special constitutional protection. Viewed in a narrower institutional sense, religion embraces a creed, a cult, a code of conduct, and a confessional community.[395] A creed defines the accepted cadre of beliefs and values concerning the ultimate origin, meaning, and purpose of life. A cult defines the appropriate rituals, liturgies, and patterns of worship and devotion that give expression to those beliefs. A code of conduct defines the appropriate individual and social habits of those who profess the creed and practice the cult. A confessional community defines the group of individuals who embrace and live out this creed, cult, and code of conduct, both on their own and with fellow believers. By this definition, a religion can be traditional or very new, closely confining or loosely structured, world-avertive or world-affirmative, atheistic, nontheistic, polytheistic, or monotheistic. Religious claims and claimants that meet this definition, in my view, deserve the closest consideration.

CONCLUSIONS

Francis Bacon, the so-called "father" of the experimental method, had three prudential instructions to correct experiments that had gone "awry." First, return to first principles. Second, reinterpret your experience with the experiment in light of these first principles, and adjust your efforts where such first principles have been defied. Third, compare your experiment with others, and adopt or adapt their techniques where appropriate.[396] This Article has applied Bacon's prudential instructions to what the eighteenth century founders called "the American experiment in religious rights and liberties."

The "first principles" of the American experiment were forged in the later eighteenth century. Theologians and jurists, believers and skeptics, churchmen and statesman all participated in their creation and confirmation—puritans, evangelicals, enlightenment philosophers, and civic repub-

394 RUDOLF OTTO, THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR OF THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL (2d ed. 1950).

395 *See* RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND RELIGIONS vii (Leonard Swidler ed., 1986). The Special Rapporteur on religious liberty, Elizabeth Odio-Benito, has written similarly that religion is "an explanation of the meaning of life and how to live accordingly. Every religion has at least a creed, a code of action, and a cult." U.N. Doc. E/CN.4/Sub.2/1987/26, at 4.

396 *See supra* notes 18-20.

licans most prominently and consistently. Their efforts, while often independent and wide-ranging, collectively yielded several "first principles" to guide the American experiment—liberty of conscience, free exercise, equality, pluralism, separationism, and disestablishment, which were collectively called "the essential rights and liberties of religion." These principles were, in effect, "incorporated" into the First Amendment religion clauses as well as in state constitutional bills of rights.

In the past half century, the United States Supreme Court has assumed principal control of the American experiment. The Court's free exercise and establishment clause cases have served both to enhance and to frustrate the experiment—in part, because these two lines of cases have not been effectively merged, in part because the Court has often dealt inconsistently with the "first principles" of the experiment. In its early free exercise cases, the Court incorporated the full range of "first principles" into its analysis—catalyzing great advances in the protection of religious rights and liberties. In the past decade, however, the Court has abruptly reduced the free exercise clause to a single principle of equality, or neutrality, rendering the free exercise clause largely inept in its protection of religious liberty. The trend in establishment clause law has been exactly the opposite. In its early establishment clause cases, the Court was almost single-minded in its devotion to the principle of separationism—yielding secularist dicta that seemed anomalous to a nation so widely devoted to a public religion and a religious public. In the past decade, however, the Court has opened its establishment clause calculus to a wide range of "first principles," which the Court is struggling mightily to integrate.

Jurists and politicians have offered an array of methods and frameworks to aid this effort of integration—in articles, briefs, bills, and various other forms and forums. The Supreme Court has, as yet, not found a viable media among these competing models or among its own plurality opinions in recent First Amendment cases. Recent international human rights instruments and practices might well open new pathways toward a more unified approach. International law confirms, refines, and elaborates many of the "essential rights and liberties of religion" endemic to the American experiment. The prioritizing of liberty of conscience, free exercise, and equality principles at international law might well serve as a prototype for the integration of free exercise and establishment clause values. The growing emphasis at international law on group religious rights, and the need for affirmative state action towards religion encourages greater protection of religious minorities in America. The international doctrine of "a margin of appreciation" for local religious practices could be put to good use in our federalist system of government with its local jury trials. The eventual resolution of the international debate between "universalism versus relativism" in human rights has enormous implications for the distinctive American debate over federal and state jurisdiction over religious rights.

The American experiment in religious rights and liberties has often been the envy of the world. Yet brief glimpses by foreigners into the Supreme Court laboratory, where much of the experiment has recently

been conducted, have often produced both caricatures and characteristically optimistic assessments of this experiment. Not all is so simple, nor so well, as it might appear from afar. However bold in conception and execution, the experiment has occasionally sputtered in the past, and it is sputtering today. In the past, it was through landmark cases—*Cantwell*, *Everson*, *Sherbert*, and *Lemon*—that the Court could set the experiment right. Today, it might well be up to Congress or to individual states eventually to restore a coherent American rule of law on religion. Whatever branch of government assumes the responsibility, it would do well to look out the windows of its laboratory on the rest of the world.