ARTICLES

A HERITAGE OF RELIGIOUS LIBERTY

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The history of law must be a history of ideas. It must represent, not merely what men have done and said, but what men have thought in bygone ages. The task of reconstructing ancient ideas is hazardous, and can only be accomplished little by little. If we are in a hurry to get to the beginning we shall miss the path.

—Sir Frederic Maitland*

INTRODUCTION

Recognizing that an examination of history can be hazardous as well as fruitful, this Article will address the historical meaning of a constitutional provision that represents one of America's great contributions to Western civilization.¹ The first amendment of the Constitution declares, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"² These sixteen words, known as the religion clauses, so simple yet capable of so many different interpretations, have sparked intense contemporary debate. In considering their meaning, Part I of this Article will survey the history of American religious liberty, Part II will discuss the Founding Fathers' views, and Part III will identify the principles that animate the clauses. Understanding these principles is more than an abstract intellectual exercise, for the authors believe they provide an essential context for guiding the resolution of modern religious liberty issues.³ To this

* F. MAITLAND, *England Before the Conquest*, in DOMESDAY BOOK AND BEYOND 356 (1897).

¹ Historian Sanford Cobb concluded that America's solution to the "world-old problem of Church and State" was "so unique, so far-reaching, and so markedly diverse from European principles as to constitute the most striking contribution of America to the science of government." S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* at vii (1902).

² U.S. CONST. amend. I.

³ Unfortunately, there is a tendency among legal scholars to disparage the use of history in interpreting the religion clauses. The authors of a leading constitutional law treatise conclude, for example, that historical study of the clauses cannot "produce clear

end, Part IV will apply these principles, by way of example, to three current issues: the voluntary meeting of student religious groups in public high schools, known as the equal access controversy; religious exercises and symbolism in public life, particularly the inclusion of invocations and benedictions in high school graduations; and the task of defining religion for constitutional purposes.

I. THE HISTORICAL BACKGROUND OF AMERICAN RELIGIOUS LIBERTY

The American Founders were influenced profoundly by philosophers and theologians who reflected on the religious conflicts that occurred in the wake of the Reformation. From Martin Luther and John Calvin they inherited the view that God had instituted "two kingdoms"—a heavenly one where the church exercised its spiritual authority and an earthly one where the civil magistrates exercised temporal authority.⁴ A liberal Roman Catholic tradition represented by Erasmus and Thomas More also exerted significant influence in the colonies, inspiring the Lords Baltimore and the Carrolls of Maryland to rethink the proper relationship between church and state.⁵ The Puritan poet

answers to current issues," and that the "seemingly irresistible impulse to appeal to history when analyzing issues under the religion clauses . . . is unfortunate because there is no clear history as to the meaning of the clauses." J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 1029-30 (2d ed. 1983). Another scholar comments that it is a serious error to regard the historical record as clear, maintaining "that the historical materials themselves will not settle anything." R. MORGAN, *THE SUPREME COURT AND RELIGION* 186 (1972). This outlook may not only discourage continued historical study of the religion clauses, but may reinforce the cynical view among lawyers that history can be invoked to prove anything. See Sutherland, *Historians, Lawyers, and "Establishment of Religion,"* in 5 *RELIGION AND THE PUBLIC ORDER* 27, 27 (D. Giannella ed. 1969) (asking "whether the lawyer [or judge] who ventures to write of the past, recent or remote, is characteristically an advocate of some disputed cause, selecting for his comment only those past records which favor his side").

⁴ Luther articulated his position most clearly in *M. LUTHER, TEMPORAL AUTHORITY: TO WHAT EXTENT IT SHOULD BE OBEYED* (Wittenberg 1523), in 45 *LUTHER'S WORKS: THE CHRISTIAN IN SOCIETY II*, at 81-129 (W. Brandt ed. 1962). A good biography is R. BAINTON, *HERE I STAND: A LIFE OF MARTIN LUTHER* (1950). Calvin sets forth his position in 2 *J. CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION* bk. IV, ch. XX (Geneva 1559 ed.) (J. McNeill ed. 1960). For a recent biography by an eminent historian, see W. BOUWSMA, *JOHN CALVIN: A SIXTEENTH-CENTURY PORTRAIT* (1988). A helpful introduction to the Reformers' views on religious liberty can be found in R. BAINTON, *THE REFORMATION OF THE SIXTEENTH CENTURY* 211-27 (1952).

⁵ In *Utopia*, first published in 1516, More presented an ideal republic committed to religious freedom; the work created a literary genre and "provided arguments for the French *Politiques*, the latitudinarians, the Deists, and those who adhere to a liberal optimism." 1 J. LECLER, *TOLERATION AND THE REFORMATION* 141 (1960). More's discussion of religious freedom in *Utopia* can be found in T. MORE, *UTOPIA* (Louvain 1518 ed.), in 4 *THE COMPLETE WORKS OF ST. THOMAS MORE* 217-47 (E. Surtz & J.

John Milton, confidant of Oliver Cromwell and friend of Roger Williams, shaped colonial thought by seeking to prove in 1659 that "for belief or practice in religion according to this conscientious persuasion no man ought be punished or molested by any outward force on earth whatsoever."⁶ From Roger Williams and William Penn, the Founders learned that state control of religion corrupted faith and that coercion of conscience destroyed true piety.⁷ From theorists such as John Locke, they appropriated concepts such as inalienable rights and toleration for the religious beliefs of others.⁸ These diverse ideas, derived largely from the intellectual currents flowing from the Reformation, influenced the colonists in developing not only their religious, but also their political institutions.

A. Colonial Background

The Virginia Company's settlements in America were motivated largely by economic considerations, but the Company's early charters and laws also disclose a deep concern for planting true religion in the New World.⁹ The famous Lawes Divine, Moral and Martial (1610-11), the first English legal code in the New World, required daily church attendance and imposed harsh penalties for blasphemy, Sab-

H. Hexter eds. 1965). For a balanced biography, see E. REYNOLDS, *THE FIELD IS WON: THE LIFE AND DEATH OF SAINT THOMAS MORE* (1968).

⁶ J. MILTON, *A TREATISE OF CIVIL POWER IN ECCLESIASTICAL CAUSES* (London 1659), in 7 *COMPLETE PROSE WORKS OF JOHN MILTON* 238, 242 (R. Ayers rev. ed. 1980) (changed to conform to modern usage). For a brief but helpful biographical and critical introduction to the man and his works, see D. BUSH, *JOHN MILTON* (1964).

⁷ For discussions of Williams and Penn, see *infra* notes 17-27 and accompanying text.

⁸ Locke's views on toleration and government greatly influenced the Founders, who employed his concepts in drafting the Declaration of Independence and the Constitution. In *A Letter on Toleration*, published anonymously in 1689, Locke advanced social and political reasons for toleration based on his exposure to England's religious strife and his association in Holland with religious refugees. He concluded that civil magistrates should tolerate every religious group except those that pose a threat either to the security of the state or to the moral well-being of society. See J. LOCKE, *A LETTER ON TOLERATION* (Gouda 1689) (J. Gough ed. & trans. 1968).

The Founders, particularly Thomas Jefferson, looked to J. LOCKE, *TWO TREATISES OF GOVERNMENT* (London 1690), more than any other work in justifying the American Revolution. The work rejected the absolutist theory of government and its corollary, the divine right of kings, and espoused a conditional theory premised on the "social compact." Recent biographies include M. CRANSTON, *JOHN LOCKE: A BIOGRAPHY* (1957) and R. WOOLHOUSE, *LOCKE* (1983).

⁹ For a general account of the settlement of Virginia, see D. HAWKE, *THE COLONIAL EXPERIENCE* 94-107 (1966). This work contains helpful background on the other colonial settlements as well. Accounts focusing on the role of religion in early Virginia include S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 184-93 (1972) and S. COBB, *supra* note 1, at 74-115.

bath-breaking, and speaking maliciously against the Trinity, God's holy word, or Christian doctrine.¹⁰ When Virginia became a royal colony in 1624, its Anglican Church settled into a pattern of preferred governmental status that endured until the Revolutionary War. This establishment was demonstrated by public support, glebe lands, compulsory church attendance, punishment of blasphemy, religious test oaths, and the suppression of dissenting views.

New England was settled by Puritans, dissenters who came to America after unsuccessful attempts to purge England's Anglican establishment of its allegedly "popish" tendencies.¹¹ The Pilgrims of Plymouth Bay were separatist Puritans who had repudiated the establishment. They demonstrated their commitment to higher law, a social compact based on covenantal theology, and government by consent in the Mayflower Compact of 1620.¹² The nonseparatist Puritans who founded the Massachusetts Bay Colony still recognized the Anglican establishment and were less tolerant than their Pilgrim brethren, setting up a theocentric commonwealth premised on Old Testament law. Their magistrates and ministers cooperated in expelling dissenters, enforcing church attendance, limiting the electoral franchise to church members, and supporting the Congregational churches through taxation.¹³ Contrary to common misconception, however, the Puritans made

¹⁰ See S. COBB, *supra* note 1, at 77-79 (summarizing this legal code and noting that it is unlikely that the "severer penalties were ever enforced").

¹¹ Given the confusion engendered by the term "Puritan," it is appropriate to define it by noting its various classifications. The Pilgrims were separatist Puritans who repudiated the Church of England, but remained loyal to the king. Like other Puritan groups, they embraced Continental Reformed theology and sought to purify the visible church by reinstating the "apostolic" tradition of church order and worship, inculcating Calvinistic doctrine, and reviving discipline and evangelical piety. Puritanism covered a broad spectrum in terms of church polity. Congregationalists, in sharp contrast to the Presbyterians and Anglicans, believed that Christians who had covenanted with God and with one another constituted a complete church body capable of determining membership, carrying out discipline and excommunication, ordaining a minister, and administering the sacraments. The Congregational Puritans, the critical group from the standpoint of early American colonization, consisted in turn of non-separatist and separatist factions. Nonseparatists remained in the Church of England in the hope of reforming it, while separatists such as the Pilgrims completely renounced any ties to the established church. See S. AHLSTROM, *supra* note 9, at 125, 132-34.

¹² A brief but insightful discussion of the Mayflower Compact and its significance can be found in SOURCES OF OUR LIBERTIES 55-59 (R. Perry & J. Cooper eds. rev. ed. 1978) [hereinafter SOURCES]. For background on the Pilgrims, see S. AHLSTROM, *supra* note 9, at 135-39, as well as the firsthand account of Plymouth Bay's first governor, W. BRADFORD, OF PLYMOUTH PLANTATION: 1620-1647 (Boston 1856) (S. Morison ed. 4th printing 1966) (Bradford wrote the account between 1630 and 1650, but it was not published until 1856).

¹³ The last half century has witnessed a renaissance in Puritan studies, inaugurated with the publication by Perry Miller of P. MILLER, ORTHODOXY IN MASSACHUSETTS, 1630-1650 (1933). Other important works by Miller include P. MILLER,

enduring contributions to America's heritage of religious liberty by repudiating ecclesiastical courts and by carefully distinguishing civil and religious authority. The impact of Puritanism on colonial thought can hardly be overstated, for as a prominent historian indicates, it "provided the moral and religious background of fully 75 percent of the people who declared their independence in 1776."¹⁴

The civil and religious turmoil in seventeenth-century England not only caused the great Puritan migration, but also inspired dissenters to look to America as a place for carrying out colonial experiments predicated on religious freedom. The Lords Baltimore, from an aristocratic Roman Catholic family, attempted heroically, but unsuccessfully, to foster religious toleration in Maryland.¹⁵ Maryland's Act Concerning Religion (1649), the first law in America to afford a measure of religious freedom, stipulated that no professing Christian should "henceforth be any ways troubled, molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof . . . nor any way compelled to the belief or exercise of any other religion against his or her consent."¹⁶

Rhode Island was founded as a haven for dissenters by two ministers, the Puritan seeker Roger Williams¹⁷ and the Baptist John

ERRAND INTO THE WILDERNESS (1956), a collection of essays, and P. MILLER, THE NEW ENGLAND MIND (1939 & 1953), a two-volume study of Puritan thought and history. S. MORISON, BUILDERS OF THE BAY COLONY (1930 & 2d ed. 1958), written by Miller's mentor, Samuel Eliot Morison, remains a valuable source. A student of Miller's, Edmund Morgan, is one of the leading Puritan scholars in recent times. Among his important works are E. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP (1958) and E. MORGAN, VISIBLE SAINTS: THE HISTORY OF A PURITAN IDEA (1963).

¹⁴ S. AHLSTROM, *supra* note 9, at 124 (footnote omitted).

¹⁵ For brief but balanced treatments, see T. HANLEY, THEIR RIGHTS AND LIBERTIES: THE BEGINNINGS OF RELIGIOUS AND POLITICAL FREEDOM IN MARYLAND (1959) and T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 29-53 (1986).

¹⁶ Act Concerning Religion (1649), in 1 ARCHIVES OF MARYLAND 244, 246 (W. Browne ed. 1883) [hereinafter MARYLAND ARCHIVES] (changed to conform to modern usage).

¹⁷ The extent to which Williams influenced the development of religious liberty in America has been hotly debated among scholars. Early biographers tended to minimize the deeply theological nature of his works and exaggerate or glorify his political contributions. See S. BROKUNIER, THE IRREPRESSIBLE DEMOCRAT: ROGER WILLIAMS (1940); V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 62-75 (1927). This tendency also appeared to a lesser extent in O. WINSLOW, MASTER ROGER WILLIAMS (1957) and 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 194-202 (1950). The publication P. MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION (1953), broke ground by asserting that Williams was first and foremost an earnest Christian thinker—indeed a particularly radical one for his day—and that he made little enduring contribution to the American tradition of religious freedom. Cf. 3 W.K. JORDAN, THE DEVELOPMENT OF RELIGIOUS TOLERATION IN ENGLAND 472-506 (1938) (concluding that Williams influenced England more than

Clarke.¹⁸ Williams devoted his life to expounding a theological basis for separation of church and state, writing the classic theological condemnation of religious persecution, *The Bloudy Tenent, of Persecution, for Cause of Conscience*, in 1644.¹⁹ In the work's preface, Williams enumerated twelve fundamental propositions; the tenth and eleventh read:

Tenthly, an enforced uniformity of religion throughout a nation or civil state, confounds the civil and religious, denies the principles of Christianity and civility, and that Jesus Christ is come in the flesh.

Eleventhly, the permission of other consciences and worships than a state professes, only can (according to God) procure a firm and lasting peace, (good assurance being taken according to the wisdom of the civil state for uniformity of civil obedience from all sorts.)²⁰

The deeply pious Williams ranks as one of the foremost advocates of the pietistic view that a wall of separation must be maintained to pro-

America in the area of religious liberty). Professor Edmund Morgan advanced a more tempered and sympathetic assessment in E. MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* (1967). In addition, M. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965), an insightful legal analysis of Williams' thought, grants the colonial leader a prominent place in the historical development of separation of church and state. See *id.* at 1-18. For an interesting and helpful discussion of Williams' thought and scholarly assessments of his contributions, see W. MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 153-224 (1986).

¹⁸ The contributions of John Clarke, Williams' co-worker and close friend, are often overlooked. He condemned religious intolerance in recounting the persecution of two Baptist friends and himself at the hands of the Puritan magistrates in Lynn, Massachusetts. See J. CLARKE, *ILL NEWES FROM NEW-ENGLAND: OR A NARATIVE OF NEW-ENGLANDS PERSECUTION* (London 1652), reprinted in 2 *COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY* 1 (4th ser. Boston 1854). His most important contribution to Rhode Island was the procurement in 1663 of the Charter of Rhode Island and Providence Plantations, which confirmed the colony's democratic form of government and liberal tradition of religious freedom. See *CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS* (1663), in 6 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 3211 (F. Thorpe ed. 1909) [hereinafter THORPE]. According to the Charter, Rhode Island's settlers desired "to hold forth a livlie experiment, that a most flourishing civill state may stand and best bee maintained . . . with a full libertie in religious concernements." *Id.* at 3212. The definitive work on the Baptists in New England is W. McLoughlin, *NEW ENGLAND DISSENT 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* (1971) (two vols.) [hereinafter W. McLoughlin, *NEW ENGLAND DISSENT*].

¹⁹ See R. WILLIAMS, *THE BLOODY TENENT, OF PERSECUTION, FOR CAUSE OF CONSCIENCE* (London 1644), in 3 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* 1 (Russell & Russell, Inc. 1963) [hereinafter *WRITINGS OF WILLIAMS*]. The first six volumes of the Russell & Russell edition are exact facsimiles of the Narragansett edition issued in 1866-74; the seventh volume, edited by Perry Miller, consists of material not included in the Narragansett edition.

²⁰ *Id.* at 4 (changed to conform to modern usage; emphasis deleted).

tect the church from worldly corruption. He announced the wall of separation metaphor over 150 years before Thomas Jefferson, writing in 1644 that when Christians "have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wilderness of the world, God hath ever broke down the wall itself, removed the Candlestick, &c. and made his Garden a Wilderness, as at this day."²¹

The Quaker leader William Penn also devoted his life to securing liberty of conscience as a God-given right beyond the dominion of government.²² Combining the roles of religious leader and political statesman, Penn expounded his views on religious liberty in numerous tracts. In the most famous of these, *The Great Case of Liberty of Conscience* (1671), he stressed that coercion of conscience destroyed authentic religious experience and "directly invade[d] the Divine Prerogative."²³ As a proprietor of West New Jersey, Penn was a principal drafter of the settlement's fundamental law, the Concessions and Agreements of West New Jersey of 1677.²⁴ The document reflected the Quaker belief that only God ruled the conscience, stating that, because no man "hath power or authority to rule over men's consciences in religious matters," no settler shall be "in the least punished or hurt, either in person, estate, or privilege, for the sake of his opinion, judgment, faith or worship towards God in matters of religion."²⁵

As sole proprietor of Pennsylvania, Penn served as the colony's

²¹ R. WILLIAMS, MR COTTONS LETTER LATELY PRINTED, EXAMINED AND ANSWERED (London 1644), in 1 WRITINGS OF WILLIAMS, *supra* note 19, at 392 (changed to conform to modern usage).

²² Scholarly biographies of Penn include E. BRONNER, WILLIAM PENN'S HOLY EXPERIMENT: THE FOUNDING OF PENNSYLVANIA 1681-1701 (1962) and C. PEARE, WILLIAM PENN: A BIOGRAPHY (1956). For an excellent work focusing on the central role of liberty of conscience in Penn's political thought and in the founding of Pennsylvania, see M. DUNN, WILLIAM PENN: POLITICS AND CONSCIENCE (1967). The author stresses that liberty of conscience was "Penn's most important and fixed political principle, and the basis of a political philosophy of natural law and fundamental right." *Id.* at viii. A thoughtful examination of the manner in which Penn's theological convictions shaped his political theory is contained in M. ENDY, WILLIAM PENN AND EARLY QUAKERISM (1973). The definitive multi-volume collection of Penn's writings is THE PAPERS OF WILLIAM PENN (M. Dunn & R. Dunn eds. 1981) (four vols.) [hereinafter PAPERS OF PENN].

²³ W. PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE (London 1670), in 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 443, 447 (J. Besse ed. 1726 & photo. reprint 1974) [hereinafter WORKS OF PENN]. The tract is dated in the text in accordance with modern reckoning.

²⁴ CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY of 1677, *reprinted in part* in SOURCES, *supra* note 12, at 184-88 (dated in accordance with modern reckoning); see also M. DUNN, *supra* note 22, at 88 & n.27 (concluding that Penn collaborated with Edward Billing in drafting the document).

²⁵ CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY of 1677, The Charter or Fundamental Laws, of West New Jersey, Agreed Upon, ch. XVI (Liberty of conscience), *reprinted in* SOURCES, *supra* note 12, at 185.

first governor and drafted its first constitution, the Frame of Government of 1682. In this document, a landmark in constitutional history, he sought to establish a theocentric society without resorting, as had the Puritan commonwealths, to coercion of conscience. The Frame of Government guaranteed that those who acknowledged God "shall, in no ways, be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship, nor shall they be compelled, at any time, to frequent or maintain any religious worship, place or ministry whatever."²⁶ While affording broad religious freedom to theists, it restricted public offices and the franchise to Christians, prohibited labor on the Sabbath, and attempted to foster public morality by outlawing a host of wild and loose actions.²⁷ The Frame of Government illustrates a tension that persisted in Penn's writings—that of reconciling expansive religious freedom with the civil order's interests and the belief that society's welfare depended on a shared religious consensus. Penn's holy experiment flourished, tending to prove that social stability could be enhanced by religious freedom. Delaware, part of Pennsylvania until 1701, shared the Quaker leader's legacy of religious freedom.

In the half century preceding the Revolution, Rhode Island, Pennsylvania, Delaware, New Jersey, and New York afforded broad religious freedom.²⁸ New Jersey and New York had nominal establishments, but their multiplicity of religious groups resulted in de facto religious freedom.²⁹ The southern colonies continued to maintain Anglicanism, but the establishments in the Carolinas and Georgia were not formidable. While the New England Way in church and state endured with remarkable vitality, the establishments were eroded by the increased diversity arising during the Great Awakening. Religious leaders such as the Baptist Isaac Backus and the Presbyterian John

²⁶ PA. FRAME OF GOVERNMENT of 1682, Laws Agreed Upon in England, art. XXXV (1682), in 5 THORPE, *supra* note 18, at 3063. For a detailed examination of Penn's drafting of the Frame of Government, see 2 PAPERS OF PENN, *supra* note 22, at 135-238.

²⁷ See PA. FRAME OF GOVERNMENT, *supra* note 26, arts. XXXIV, XXXVI & XXXVII, in 5 THORPE, *supra* note 18, at 3062-63. The guarantees of religious freedom in the famous Pennsylvania Charter of Privileges of 1701 were similar, with the notable difference that liberty of conscience was made inviolable. See PA. CHARTER OF PRIVILEGES OF 1701, art. I (granting liberty of conscience to those who acknowledge God and limiting the right to hold public office to Christians) & art. VIII (stating that "the First Article of this Charter relating to Liberty of Conscience . . . shall be kept and remain, without any Alteration, inviolably for ever"), in 5 THORPE, *supra* note 18, at 3077-78, 3079-80.

²⁸ For a discussion of church and state in the colonies in the first half of the eighteenth century, see T. CURRY, *supra* note 15, at 78-104.

²⁹ This pluralism anticipated the future American experience, perhaps illustrating Madison's belief that religious liberty is most easily safeguarded in a country with numerous denominations. See *infra* notes 216-18 and accompanying text.

Witherspoon, joined with political activists such as James Otis and Samuel Adams in opposing British tyranny.³⁰

B. *Religious Liberty in the New Nation*

The ideas that shaped colonial attitudes on the eve of the Revolution included the supremacy of natural law, the concept of inalienable rights, the importance of a written constitution, and government by popular consent.³¹ The Declaration of Independence largely embodied these views, drawing heavily on English legal theory, the Whig political tradition, and Puritan covenant theology.³² Although it did not ad-

³⁰ The colonists' growing outrage found classic expression in the popular pamphlet J. OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* (Boston 1764), in 1 *PAMPHLETS OF THE AMERICAN REVOLUTION: 1750-1776*, at 408 (B. Bailyn ed. 1965), which emphasized the supremacy of natural law. "Kingcraft and priestcraft," Otis stated, "have fallen out so often that 'tis a wonder this grand and ancient alliance is not broken off forever. Happy for mankind will it be when such a separation shall take place." *Id.* at 425 n.4. In *A State of the Rights of the Colonists*, drafted by Samuel Adams and his Sons of Liberty, Boston colonists enumerated their fundamental rights on the eve of the Revolution. See S. ADAMS, *A STATE OF THE RIGHTS OF THE COLONISTS* (Boston 1772), in *TRACTS OF THE AMERICAN REVOLUTION: 1763-1776*, at 233 (M. Jensen ed. 1967). Among the asserted liberties was a "natural right to worship God according to the dictates of [one's] own conscience." *Id.* at 238. Asserting that "our Ancestors came over to this Country that they might not only enjoy their civil but their religious rights," it denounced the various attempts "to establish an American Episcopate." *Id.* at 250.

³¹ The classic exposition of the ideas shaping America's constitutional tradition is E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955), which focuses on the centrality of natural law. For a brief but illuminating discussion of colonial political thought, see A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 36-46 (5th ed. 1976). In addition to the writings of the Reformers, the Dutch philosophers, and the French philosophes, the colonists derived their political theory from seventeenth and eighteenth century writers on natural law and from the English legal theorists Edward Coke and William Blackstone. P. FURNEAUX, J. PRIESTLEY & W. BLACKSTONE, *THE PALLADIUM OF CONSCIENCE* (Philadelphia 1773) (L. Levy ed. 1974), a work containing a debate between William Blackstone and Joseph Priestley, showed English attitudes concerning the interaction between religious freedom and the Anglican establishment on the eve of the Revolution. Jefferson, Franklin, and other colonial statesmen greatly respected Priestley, a minister, scientist, and philosopher who emigrated to America in 1794.

For a thought-provoking article tracing the influence of colonial church covenants, law codes, and charters on the American constitutional tradition, see Lutz, *The Origins of American Constitutionalism: The Colonial Heritage*, 2 *JURIS* 1 (1987).

³² See *The Declaration of Independence* (U.S. 1776). See generally C. BECKER, *THE DECLARATION OF INDEPENDENCE* (1942) (examining the political and philosophical roots of the Declaration of Independence); 1 A. STOKES, *supra* note 17, at 461-66 (elaborating on the history behind the religious references made in the Declaration of Independence); Anastaplo, *The Declaration of Independence*, 9 *ST. LOUIS U.L.J.* 390 (1965) (offering a framework for interpreting the text of the document); Van Patten, *In the End is the Beginning: An Inquiry into the Meaning of the Religion Clauses*, 27 *ST. LOUIS U.L.J.* 1, 36-43 (1983) (concluding on the basis of history that the Declara-

dress the issue of religious freedom,³³ the Declaration rested on broadly theistic presuppositions and contained four references to the Deity: "nature's God" and "Creator" in the first two paragraphs and "Supreme Judge of the world" and "Divine Providence" in the concluding paragraph.³⁴ The document's most famous words disclose its theistic premise: "We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."³⁵ The Declaration of Independence, the Constitution, and the Articles of Confederation, comprise the "organic law" of the United States. As rector of the University of Virginia, Jefferson authored a resolution on reading materials for the law school that listed the Declaration and Washington's Farewell Address as two of the "best guides" for understanding "the distinctive principles of [American] government."³⁶

At the direction of the Continental Congress, all the states except Rhode Island and Connecticut adopted constitutions between 1776 and 1780.³⁷ The Virginia Declaration of Rights, drafted principally by George Mason, guaranteed the free exercise of religion and served as a model for other state charters.³⁸ Pennsylvania and New Jersey granted

tion of Independence is "vital" to understanding the American tradition of religious liberty).

³³ By 1776, the issue was not a principal source of friction between the colonies and the Crown. The colonists had successfully resisted the establishment of an Anglican episcopate and had historically exercised control over their own religious affairs with little interference from the Crown. See 1 A. STOKES, *supra* note 17, at 463 ("[M]ost of the church establishments which existed in the United States [in 1776] were not imposed by the English government.").

³⁴ The Declaration of Independence paras. 1, 2, 31 (U.S. 1776). While reflecting certain Enlightenment concepts such as "nature's God" and the social compact theory, the Declaration was, of necessity, a consensus document subject to both deistic and pietistic interpretations. A broadly theistic position was necessary, for its fifty-six signers represented six different denominations, including thirty-four Anglicans, thirteen Congregationalists, six Presbyterians, one Baptist, one Quaker and one Roman Catholic. See 1 A. STOKES, *supra* note 17, at 464. Yet the signers generally agreed that a transcendent Creator had conferred certain inalienable rights that were antecedent to and beyond the dominion of human government.

³⁵ The Declaration of Independence para. 2 (U.S. 1776).

³⁶ Resolution of the Board of Visitors of the University of Virginia (Mar. 4, 1825), in THE COMPLETE JEFFERSON 1112 (S. Padover ed. 1943). Madison concurred with this assessment, also adding Washington's Inaugural Address. See Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), in 9 THE WRITINGS OF JAMES MADISON 218, 221 (G. Hunt ed. 1910) [hereinafter WRITINGS OF MADISON] (commenting on Jefferson's "intended proposal" concerning reading materials for the law school).

³⁷ Connecticut and Rhode Island continued under their liberal colonial charters.

³⁸ James Madison served on the committee that drafted the Declaration, playing a critical role in deliberations concerning Article 16, the document's provision on religious liberty. Troubled by the committee's adoption of Mason's wording, which af-

broad liberty of conscience and prohibited compulsory attendance at or support of worship.³⁹ Delaware's Declaration of Rights contained a liberty of conscience guarantee mirroring Pennsylvania's; its first constitution prohibited the "establishment of any one religious sect in this State in preference to another," while its second guaranteed the free exercise of religion and proscribed compulsory attendance at or support of worship.⁴⁰ The New York Constitution of 1777 guaranteed "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, . . . *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."⁴¹

Along with Virginia, the other southern colonies that recognized broad religious rights were North Carolina and Georgia.⁴² Maryland's

forded only "the fullest Toleration in the Exercise of Religion," Madison proposed an amendment guaranteeing that "all men are equally entitled to enjoy the free exercise of religion." The convention adopted Madison's proposed revision. *See* JAMES MADISON ON RELIGIOUS LIBERTY 51-52 (R. Alley ed. 1985). As adopted, Article 16 read:

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.

VA. DECLARATION OF RIGHTS of 1776, art. 16, in 7 THORPE, *supra* note 18, at 3814.

³⁹ The Pennsylvania Declaration of Rights stated: "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences . . ." PA. CONST. of 1776, Declaration of Rights, art. II, in 5 THORPE, *supra* note 18, at 3082. The New Jersey Constitution of 1776 guaranteed that no person would "be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience." N.J. CONST. of 1776, art. XVIII, in 5 THORPE, *supra* note 18, at 2597.

⁴⁰ DEL. DECLARATION OF RIGHTS of 1776, § 2, *reprinted in* SOURCES, *supra* note 12, at 338; DEL. CONST. of 1776, art. 29, in 1 THORPE, *supra* note 18, at 567. The Delaware Constitution of 1792 stated that no civil power "shall in any case interfere with, or in any manner control, the rights of conscience, in the free exercise of religious worship, nor a preference be given by law to any religious societies, denominations, or modes of worship." DEL. CONST. of 1792, art. I, § 1, in 1 THORPE, *supra* note 18, at 568.

⁴¹ N.Y. CONST. of 1777, art. XXXVIII, in 5 THORPE, *supra* note 18, at 2637.

⁴² The North Carolina Declaration of Rights of 1776 stated: "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences." N.C. CONST. of 1776, Declaration of Rights, art. XIX, in 5 THORPE, *supra* note 18, at 2788. Georgia's first constitution stated: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession." GA. CONST. of 1777, art. LVI, in 2 THORPE, *supra* note 18, at 784. The religious freedom provision in the Georgia Constitution of 1789 was similar: "All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their

new constitution granted complete religious liberty only to Christians and authorized a general tax "for the support of the Christian religion."⁴³ South Carolina's second constitution, adopted in 1778, established the "Christian Protestant religion" in great detail, but its constitution of 1790 broadly guaranteed religious freedom.⁴⁴ In keeping with its Congregational establishment, the Massachusetts Constitution of 1780 protected one's worship of God according to "the dictates of his own conscience," but granted equal treatment only to Christian denominations, allowed public support for "Protestant teachers," and authorized the legislature to require attendance at religious instruction.⁴⁵ New Hampshire's first constitution did not mention religion, but its constitution of 1784 contained provisions similar to those of the Massachusetts Constitution of 1780.⁴⁶

In the decade following independence, the Continental Congress authorized legislative and military chaplains, provided for the importation of Bibles, and proclaimed days of thanksgiving, prayer, and fasting.⁴⁷ The Articles of Confederation, adopted by Congress in 1777 and ratified in 1781, served as the nation's fundamental law before the Constitution. The Articles referred to the "Great Governor of the world" in article XIII and provided the model for federal noninterference in state religious affairs.⁴⁸ The Northwest Ordinance of 1787, the

own." GA. CONST. of 1789, art. IV, § 5, in 2 THORPE, *supra* note 18, at 789.

⁴³ MD. CONST. of 1776, Declaration of Rights, art. XXXIII, in 3 THORPE, *supra* note 18, at 1689.

⁴⁴ See S.C. CONST. of 1778, art. XXXVIII, in 6 THORPE, *supra* note 18, at 3255-57; S.C. CONST. of 1790, art. VIII, § 1, in 6 THORPE, *supra* note 18, at 3264. The 1790 provision was virtually identical to the 1777 New York provision. See *supra* note 41 and accompanying text.

⁴⁵ MASS. CONST. of 1780, pt. I (Declaration of Rights), arts. II & III, in 3 THORPE, *supra* note 18, at 1889-90.

⁴⁶ See N.H. CONST. of 1776, in 4 THORPE, *supra* note 18, at 2451; N.H. CONST. of 1784, pt. I (Bill of Rights), arts. V & VI, in 4 THORPE, *supra* note 18, at 2454. Although Vermont did not join the Union until 1791, it adopted a constitution in 1777 with a religious freedom provision similar to that of the Pennsylvania Constitution of 1776. See VT. CONST. of 1777, ch. I (Declaration of Rights), art. III, in 6 THORPE, *supra* note 18, at 3740; see also *supra* note 39 (quoting PA. CONST. of 1776, Declaration of Rights, art. II). The provision in the Vermont Constitution of 1777 was included, with minor variations, in the Vermont constitutions of 1786 and 1793. See VT. CONST. of 1786, ch. I (Declaration of Rights), art. III, in 6 THORPE, *supra* note 18, at 3752; VT. CONST. of 1793, ch. I (Declaration of Rights), art. 3, in 6 THORPE, *supra* note 18, at 3762.

⁴⁷ See generally 1 A. STOKES, *supra* note 17, at 447-48 (noting these and other actions that revealed the Founders' belief in the importance of religion to the republic).

⁴⁸ See ARTICLES OF CONFEDERATION, art. XIII, in 1 THORPE, *supra* note 18, at 15. Under article II, the states retained sovereignty over all matters except those "delegated to the United States"; in article III, the states pledged to assist one another when attacked "on account of religion, sovereignty, trade, or any other pretence whatever," but the document nowhere delegated any authority in religious matters to the federal

most important legislative act preceding the Constitution, established a republican form of government and a bill of rights for the Northwest Territory.⁴⁹ According to the preamble, the bill of rights was promulgated to extend "the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected."⁵⁰ Article I declared, "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments in the said territory."⁵¹ The Founders recognized the importance of religion to the republic in article III: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."⁵²

The period between 1776 and the Constitutional Convention witnessed heightened efforts in the struggle against the remaining establishments.⁵³ The campaign in Virginia, called the "Virginia struggle," was especially important because of the involvement of George Mason, Patrick Henry, James Madison, and Thomas Jefferson.⁵⁴ In the mid-

government. See *id.* arts. II & III, in 1 THORPE, *supra* note 18, at 10.

⁴⁹ See Northwest Ordinance (1787), reprinted in SOURCES, *supra* note 12, at 392.

⁵⁰ *Id.* § 13, at 395.

⁵¹ *Id.* art. I, at 395.

⁵² *Id.* art. III, at 396.

⁵³ For discussions of the movement towards disestablishment in the various states, see T. CURRY, *supra* note 15, at 134-92; 1 A. STOKES, *supra* note 17, at 358-446.

⁵⁴ Despite its age, H. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA (1910), remains an authoritative account of the Virginia struggle. Another lengthy account, which includes important documents, is C. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (1900), which focuses on the contribution of the Baptists. Both works were reprinted by De Capo Press in 1971. For a more recent discussion, see R. ISAAC, THE TRANSFORMATION OF VIRGINIA: 1740-1790, at 273-95 (1982); see also 1 A. STOKES, *supra* note 17, at 366-97 (describing the struggle for disestablishment in Virginia and its influence on other states).

No other historical episode has influenced the Supreme Court's interpretation of the religion clauses more than the Virginia struggle. References to it abound in the Justices' opinions in religious liberty cases. Justice Rutledge asserted that the religion clauses were the "direct culmination" of the "long and intensive struggle for religious freedom" in Virginia. *Everson v. Board of Educ.*, 330 U.S. 1, 33-34 (1947) (Rutledge, J., dissenting). Justice Frankfurter described the Virginia struggle "as a gloss on the signification of the [First] Amendment." *McGowan v. Maryland*, 366 U.S. 420, 494 (1961) (Frankfurter, J., separate opinion). Writing for the Court in *McGowan*, Chief Justice Warren concluded that the campaign to enact Jefferson's bill is "particularly relevant in the search for the First Amendment's meaning." *McGowan*, 366 U.S. at 437. See also *Walz v. Tax Comm'n*, 397 U.S. 664, 704-06 (1970) (Douglas, J., dissenting) (discussing Madison's opposition to the Assessment Bill); *McCullum v. Board of Educ.*, 333 U.S. 203, 247-48 (1948) (Reed, J., dissenting) (discounting the general applicability of Madison's views on the Assessment Bill); *Reynolds v. United States*, 98 U.S. 145, 163 (1879) (noting that "the controversy [over public taxation for religion] was animated in many of the States, but seemed at last to culminate in Virginia"). The Court's heavy reliance on the Virginia struggle, rather than the legislative history of the

eighteenth century, Virginia's Presbyterians and Baptists joined deists in political agitation and in aggressively pressing the courts for religious equality. Samuel Davies, perhaps the most respected dissenting minister in the South, led the Presbyterians in establishing the Hanover Presbytery as a formidable institution in the struggle.⁵⁵ In a famous memorial submitted in October 1776, the Presbytery petitioned the legislature to repeal all laws "which countenance religious dominations" so that those of "every religious sect may be protected in the full exercise of their several modes of worship, and exempted from the payment of all taxes for the support of any church whatever, farther than what may be agreeable to their own private choice, or voluntary obligation."⁵⁶ The Baptists proved even more zealous, denouncing all governmental support for Anglicanism and providing essential political underpinning for Madison's battle against a general assessment for religion.

Prior to passage of the Declaration of Rights in 1776, Virginia had required citizens, through a compulsory tax, to support the state's established Anglican Church. The legislature abolished this compulsory tax for nonmembers of the Church in 1776 and for members in 1779. Five years later, however, the issue arose in a somewhat different context. In 1784, the General Assembly considered Patrick Henry's Bill Establishing a Provision for Teachers of the Christian Religion, commonly called the Assessment Bill, which would require all citizens to pay a modest annual tax for the support of the Christian religion.⁵⁷ The bill accommodated both the religious and nonreligious taxpayer; the former could designate the church that would receive his tax, while the latter could give the assessment to "seminaries of learning within [his] Count[y]."⁵⁸

With the Assessment Bill all but enacted, Madison and others persuaded the General Assembly to postpone voting on the bill and to submit it for public comment. The public, particularly the state's religious dissenters, responded with a flood of critical petitions and memorials.

religion clauses, has prompted sharp criticisms from legal commentators. See *infra* notes 162-63 and accompanying text.

⁵⁵ See G. PILCHER, *SAMUEL DAVIES: APOSTLE OF DISSENT IN COLONIAL VIRGINIA* 94 (1971).

⁵⁶ A Memorial of the Presbytery of Hanover (Oct. 24, 1776), *reprinted in part in* C. JAMES, *supra* note 54, at 73.

⁵⁷ For the text of the Assessment Bill, see *Everson*, 330 U.S. app. at 72-74 (Rutledge, J., dissenting).

⁵⁸ Assessment Bill, *id.* app. at 74 (Rutledge, J., dissenting). While the measure was worded to aid only "Christian" ministers and teachers, this limitation would have made little practical difference because in 1784 "Christianity and religion were [virtually] synonymous in Virginia" and "there were no non-Christian teachers of religion [in the state]." L. PFEFFER, *CHURCH, STATE AND FREEDOM* 110 (rev. ed. 1967).

During the legislature's adjournment, Madison wrote the *Memorial and Remonstrance Against Religious Assessments*,⁵⁹ a forceful condemnation of the tax measure as "a dangerous abuse of power" that violated every man's inalienable right "to render to the Creator such homage and such only as he believes to be acceptable to him."⁶⁰ Liberty of conscience, Madison asserted, was "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."⁶¹ He insisted that "the same authority which can force a citizen to contribute three pence . . . for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."⁶² Widely distributed by Madison's friends before the General Assembly reconvened, the *Memorial and Remonstrance* generated such popular and political opposition to the Assessment Bill that the measure died in committee in December, 1785. Although Madison's document figured prominently in the assessment controversy, the tax measure's defeat could not have been achieved without the support of Virginia's religious dissenters.

Enactment of Jefferson's Bill for Establishing Religious Freedom in 1786 marked the virtual end of the Anglican establishment in Virginia.⁶³ The Act denounced as "sinful and tyrannical" attempts by civil and ecclesiastical rulers to assume "dominion over the faith of others."⁶⁴ It placed Virginia's various religious groups on an equal legal footing, declaring:

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

⁵⁹ Madison, *Memorial and Remonstrance Against Religious Assessments* (circa June 20, 1785) [hereinafter *Memorial and Remonstrance*], in 8 THE PAPERS OF JAMES MADISON 298 (W. Hutchison & W. Rachal eds. 1973) [hereinafter PAPERS OF MADISON].

⁶⁰ *Id.* preamble & para. 1, at 299.

⁶¹ *Id.* para. 1, at 299.

⁶² *Id.* para. 3, at 300.

⁶³ For the text of the bill, see Jefferson, A Bill for Establishing Religious Freedom (1785), in 2 THE PAPERS OF THOMAS JEFFERSON 545-47 (J. Boyd ed. 1950) [hereinafter PAPERS OF JEFFERSON]. The bill, first published in 1779, was introduced several times in the Virginia legislature before its enactment in 1786. When the legislature enacted the 1785 bill, it deleted some of Jefferson's language. See An Act for Establishing Religious Freedom, ch. XXXIV (1786), in 12 HENING'S STATUTES AT LARGE 84 (1823).

⁶⁴ An Act for Establishing Religious Freedom art. I, *supra* note 63, at 84.

religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.⁶⁵

The Baptist minister John Leland led his denomination in support of Jefferson's bill and worked for complete disestablishment in Virginia.⁶⁶

Disestablishment of Anglicanism in the other southern colonies was achieved more easily than in Virginia.⁶⁷ North Carolina and Georgia lacked the clergy and ecclesiastical resources to build anything but nominal establishments. In South Carolina, the efforts of the Presbyterians, led by the Reverend William Tennent, hastened the abolition of the establishment. The South Carolina Constitution of 1790 failed to provide for an establishment and guaranteed free exercise without "discrimination or preference."⁶⁸ Maryland abandoned its Anglican establishment during the Revolution, but adopted a modified Erastian policy and continued to prefer Anglicanism. For Jews and other non-Christians, complete religious liberty in Maryland came only after a long and bitter struggle.

C. *The Constitutional Period*

By 1787, it was evident that national unity could not be achieved under the Articles of Confederation. During that summer, fifty-five delegates representing twelve states gathered in Philadelphia to amend the Articles, but decided instead to draft a completely new form of government. Deeply divided between Federalist and state's rights positions, the delegates overcame a number of differences and on September 17th submitted the new Constitution to the state ratifying conventions. The only reference to religion was in article VI, which provided that federal and state officials "shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."⁶⁹

⁶⁵ *Id.* art. II, at 86.

⁶⁶ Perhaps Leland's most famous defense of religious liberty was J. LELAND, *THE RIGHTS OF CONSCIENCE INALIENABLE* (New London 1791), in which he argued that, because religious freedom is an inalienable right, "every man ought to be at liberty to serve God in that way that he can best reconcile it to his conscience." *Id.* at 7. In rejecting the traditional notion that a state could not survive without a religious establishment, Leland maintained that enforcement of orthodoxy through law caused hypocrisy, alienated religious groups from one another, inhibited economic prosperity, transformed the church into a political creature, and kept "from civil office, the best of men." *Id.* at 10-11.

⁶⁷ See T. CURRY, *supra* note 15, at 134-58; 1 A. STOKES, *supra* note 17, at 397-404, 432-34, 439-40; see also S. COBB, *supra* note 1, at 115-32, 362-98, 418-21.

⁶⁸ S.C. CONST. of 1790, art. VIII, § 1, in 6 THORPE, *supra* note 18, at 3264.

⁶⁹ U.S. CONST. art. VI, cl. 3.

Given the long history of test oaths, this provision represented a significant achievement. Civil authorities in the Anglo-American tradition had long used religious test oaths to identify and harass dissenters. In seventeenth-century England, such oaths had proven particularly effective against Catholics and Quakers, as the first Lord Baltimore and William Penn could readily confirm.

The American colonists adapted English test oaths to support Anglican and Congregational establishments. State constitutions enacted during the war commonly required test oaths for holding public office. Only Protestants could hold public office in New Jersey or sit in the legislatures of Georgia, South Carolina, and New Hampshire; only those professing "the Christian religion" could hold public office in Maryland or serve in high government positions in Massachusetts.⁷⁰ North Carolina limited public offices to those who believed in God, the truth of the Protestant religion, and the divine authority of both the Old and New Testaments.⁷¹ Even the states influenced by Quakerism enforced religious tests. Before taking their seats, Pennsylvania legislators had to declare: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration."⁷² Delaware went further by requiring all officeholders to profess belief in the Trinity and the divine

⁷⁰ See N.J. CONST. of 1776, art. XIX, in 5 THORPE, *supra* note 18, at 2597-98 ("all persons, professing a belief in the faith of any Protestant sect . . . shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature"); GA. CONST. of 1777, art. VI, in 2 THORPE, *supra* note 18, at 779 (requiring that all representatives "be of the Protestant [sic] religion"); S.C. CONST. of 1778, arts. XII & XIII, in 6 THORPE, *supra* note 18, at 3250-52 (requiring that senators and representatives "be of the Protestant religion"); see also *id.* art. III, in 6 THORPE, *supra* note 18, at 3249 (requiring the governor, lieutenant-governor and members of privy council to be Protestants); N.H. CONST. of 1784, pt. II (Form of Government), in 4 THORPE, *supra* note 18, at 2460-65 (requiring that anyone serving as a state senator or representative or as governor be a Protestant); MD. CONST. of 1776, Declaration of Rights, art. XXXV, in 3 THORPE, *supra* note 18, at 1690 (requiring "a declaration of a belief in the Christian religion" as a qualification for holding public office); MASS. CONST. of 1780, pt. 2 (Frame of Government), ch. VI, art. I, in 3 THORPE, *supra* note 18, at 1908 (requiring "[a]ny person chosen governor, lieutenant-governor, councillor, senator, or representative" to profess "the Christian religion").

⁷¹ N.C. CONST. of 1776, Form of Government, art. XXXII, in 5 THORPE, *supra* note 18, at 2793.

⁷² PA. CONST. of 1776, Frame of Government, § 10, in 5 THORPE, *supra* note 18, at 3085 (emphasis deleted). Vermont legislators had to make a virtually identical declaration, except that "and own and profess the protestant religion" was added at the end. VT. CONST. of 1777, ch. II (Frame of Government), § IX, in 6 THORPE, *supra* note 18, at 3743.

inspiration of the Bible.⁷³

The federal test oath clause was primarily the work of Charles Pinckney, an Episcopalian lawyer from South Carolina. Early in the Convention he introduced the so-called "Pinckney Plan," which included a proposal that "[t]he legislature of the United States shall pass no law on the subject of religion"⁷⁴ The Convention never acted on this proposal, probably because most delegates believed such a clause unnecessary. The federal government was limited strictly to enumerated powers and therefore possessed no authority over religion. The Convention, however, approved Pinckney's proposed ban on religious tests with little debate.⁷⁵

The ban, however, provoked vigorous discussion in several of the state ratifying conventions. In Connecticut, Federalist Oliver Ellsworth defended the federal ban on religious tests within a series of newspaper letters signed, "A Landholder." In *Landholder*, No. 7, he answered those who attacked the clause, concluding that its "sole purpose" was to secure "the important right of religious liberty" and that "[a] test-law is the parent of hypocrisy, and the offspring of error and the spirit of persecution."⁷⁶ The influential Isaac Backus, an Antifederalist delegate in the Massachusetts convention, supported the Constitution because of

⁷³ Every person elected to the legislature or "appointed to any office or place of trust" had to make the following declaration: "I, A B, do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed forevermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration." DEL. CONST. of 1776, art. 22, in 1 THORPE, *supra* note 18, at 566.

⁷⁴ 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 131 (J. Elliot 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (May 29, 1787).

⁷⁵ According to Luther Martin of Maryland:

[The test oath clause] was adopted by a great majority of the convention, and without much debate; however, there were some members so unfashionable as to think, that a belief of the existence of a Deity, and of a state of future rewards and punishments would be some security for the good conduct of our rulers, and that, in a Christian country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism.

Martin, *The Genuine Information delivered to the Maryland Legislature in 1787*, in SECRET PROCEEDINGS AND DEBATES OF THE CONVENTION 3, 89-90 (Louisville 1845). This document has been reprinted in several sources, including 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172, (M. Farrand rev. ed. 1937) [hereinafter FARRAND'S RECORDS].

⁷⁶ Ellsworth, *Landholder*, No. 7 (Dec. 17, 1787), reprinted in 4 THE FOUNDERS' CONSTITUTION 639, 639-40 (P. Kurland & R. Lerner eds. 1987) [hereinafter FOUNDERS' CONSTITUTION]. *Landholder*, No. 7 was first published in the Connecticut Courant on December 17, 1787.

its provision prohibiting religious test oaths:

[N]othing is more evident, both in reason and the Holy Scriptures, than that religion is ever a matter between God and individuals; and, therefore, no man or men can impose any religious test, without invading the essential prerogatives of our Lord Jesus Christ. . . . And let the history of all nations be searched from [Constantine's] day to this, and it will appear that the imposing of religious tests hath been the greatest engine of tyranny in the world. . . . Some serious minds discover a concern lest, if all religious tests should be excluded, the Congress would hereafter establish Popery, or some other tyrannical way of worship. But it is most certain that no such way of worship can be established without any religious test.⁷⁷

In Virginia, Madison emerged as the leading spokesman for the provision, while in North Carolina, James Iredell, soon to become a United States Supreme Court Justice, defended the clause "as one of the strongest proofs that could be adduced, that it was the intention of those who formed this system to establish a general religious liberty in America."⁷⁸

The federal test oath clause apparently had a liberalizing effect on the states. The Pennsylvania Constitution of 1790 contained a much weaker religious test than its constitution of 1776 and by 1793 Delaware, South Carolina, Georgia, and Vermont had completely removed religious tests from their constitutions. The revision of Pennsylvania's test oath of 1776 resulted in part from the efforts of Philadelphia's Jewish community. In December 1783, the city's one synagogue submitted a memorial to the civil authorities objecting to the requirement that state legislators acknowledge the divine inspiration of the Old and New Testaments.⁷⁹ Four years later, Jonas Phillips, a Philadelphia Jew, petitioned the Federal Constitutional Convention concerning the same provision.⁸⁰ The Pennsylvania Constitution of 1790 accommodated the Jewish requests, requiring only that state officials acknowl-

⁷⁷ 2 ELLIOT'S DEBATES, *supra* note 74, at 148-49 (Feb. 4, 1788).

⁷⁸ 4 *Id.* at 193 (July 30, 1788).

⁷⁹ See Petition to the Council of Censors of Pennsylvania (Dec. 23, 1783), *reprinted in* 1 A. STOKES, *supra* note 17, at 287-89. On the role of the Jews in colonial America, see L. SCHWARTZ, *JEWS AND THE AMERICAN REVOLUTION: HAYM SOLOMON AND OTHERS* (1987); *JEWS AND THE FOUNDING OF THE REPUBLIC* (J. Sarna, B. Kraut & S. Joseph eds. 1985).

⁸⁰ See Petition of Jonas Phillips to the President and members of the Constitutional Convention (Sept. 7, 1787), *reprinted in* 4 FOUNDERS' CONSTITUTION, *supra* note 76, at 638-39.

edge "the being of a God and a future state of rewards and punishments."⁸¹ Despite the decline of religious test oaths, they endured with remarkable tenacity until 1961, when the Supreme Court invalidated a Maryland law requiring notary publics to declare a belief in God.⁸²

Despite Federalist assurances that the national government exercised only enumerated powers, the absence of a bill of rights in the Constitution evoked strong protests among the populace and in the state ratifying conventions.⁸³ Although Pennsylvania and Maryland ratified the Constitution without recommending any amendments, some delegates in their ratifying conventions criticized the document for failing to guarantee basic rights.⁸⁴ New Hampshire and New York approved the Constitution by close votes, but both states proposed amendments that included religious liberty guarantees.⁸⁵ New Hampshire's proposed eleventh amendment read: "Congress shall make no laws touching religion, or to infringe the rights of conscience."⁸⁶ Almost certainly drafted by Samuel Livermore, this provision played an important role in the legislative history of the religion clauses.⁸⁷ When the First Congress met in New York in 1789, it faced the tasks of launching the new government and addressing the demand for a bill of rights.

On June 8, 1789, Madison introduced a series of suggested amendments in the House of Representatives.⁸⁸ To fulfill a campaign

⁸¹ PA. CONST. of 1790, art. IX, § 4, in 5 THORPE, *supra* note 18, at 3100.

⁸² *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961).

⁸³ The responses of the ratifying conventions concerning the absence of a religious liberty guarantee are discussed in C. ANTIEAU, A. DOWNEY & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* 111-42 (1964).

⁸⁴ *See id.* at 114-17.

⁸⁵ *See id.* at 119-22.

⁸⁶ 1 ELLIOT'S DEBATES, *supra* note 74, at 326.

⁸⁷ For a discussion of Livermore's contribution to religious freedom, see 1 A. STOKES, *supra* note 17, at 314-18.

⁸⁸ Commentary on the legislative history of the religion clauses is legion. Unfortunately, scholars have generally approached this history with the aim of either proving or disproving the nonpreferentialist thesis. According to this thesis, the Framers intended the clauses to prohibit support for a particular religion, but not for religion in general. For authority supporting the nonpreferentialist position, see Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting); R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* at ii, 5-15 (1982) [hereinafter R. CORD, *SEPARATION*]; M. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 9 (1978); R. SMITH, *PUBLIC PRAYER AND THE CONSTITUTION* 73-105 (1987); Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129 (1986). For criticisms of this position, see L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 91-119 (1986) [hereinafter L. LEVY, *ESTABLISHMENT*]; L. LEVY, *No Establishment of Religion: The Original Understanding, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 169, 170-79 (1972); Laycock, "Nonpreferential" Aid to Religion: A False Claim

promise made to Baptist constituents, he included a provision guaranteeing religious freedom: "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."⁸⁹ He also proposed a clause exempting persons "religiously scrupulous of bearing arms" from military service and a clause stating that "[n]o State shall violate the equal rights of conscience."⁹⁰ Pressed by the need for organizing the new government, the House took little action on these proposals until August 15, when it passed Livermore's motion to adopt the New Hampshire ratifying convention's proposed eleventh amendment.⁹¹ Five days later, the House adopted an amendment based on wording recommended by Fisher Ames of Massachusetts: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."⁹² This amendment and others, including the prohibition against state infringement of conscience, were forwarded to the Senate on August 24.⁹³

The record of the Senate debates is fragmentary because the body met in secret. Evidence suggests, however, that the Senate took a guarded approach concerning the House's religious freedom proposals. On September 7, the Senate rejected the clause prohibiting the states from violating the equal rights of conscience, and two days later adopted a religious freedom provision that was significantly narrower than the House version: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of

About Original Intent, 27 WM. & MARY L. REV. 875 (1986).

It is questionable whether the rich and diverse history of the religion clauses can be reduced to such a simplistic formula. Rather than adopting an eisegetical approach, which imposes a thesis on history, scholars should employ an exegetical approach, examining history independently of presentist concerns. ("Presentist" is a term used by historians to describe the improper use of history to support current views.) For an insightful argument that the Founders did not think of establishment in terms of the nonpreferential framework, see T. CURRY, *supra* note 15, at 207-10. A helpful historical overview can be found in Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986).

⁸⁹ 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 434 (J. Gales ed. 1834) [hereinafter ANNALS] (June 8, 1789). Given that pagination varies among different editions of the ANNALS, the date is the surest way to locate a specific passage.

⁹⁰ *Id.* at 434, 435 (June 8, 1789).

⁹¹ See *id.* at 731 (Aug. 15, 1789). On August 17, the House debated Madison's conscientious objector clause and adopted the provision prohibiting the states from "infring[ing] the equal rights of conscience." See *id.* at 749-51, 755 (Aug. 17, 1789).

⁹² *Id.* at 766 (Aug. 20, 1789). On the same day, the House adopted a clause based on Madison's proposed conscientious objector provision. See *id.* at 767.

⁹³ See *id.* at 779 (Aug. 24, 1789). For some unknown reason, the conscientious objector provision was not among the amendments sent to the Senate.

religion"⁹⁴

Unable to agree on several proposed amendments, including the religious freedom provision, the two houses referred the matters to a joint committee consisting of Senators Oliver Ellsworth of Connecticut, Charles Carroll of Maryland, and William Paterson of New Jersey, and Representatives Roger Sherman of Connecticut, John Vining of Delaware, and Madison. This group produced the present wording of the first amendment. Unfortunately, no record of their deliberations has been preserved, so the authorship of the amendment and precise intent of the committee remains uncertain.

In addition to framing the religion clauses, the First Congress revised the Northwest Ordinance of 1787 and passed a resolution requesting the President to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God."⁹⁵ On September 25, 1789, President Washington submitted twelve proposed amendments to the states; what is now the first amendment was the third of these articles.

The ratification proceedings in the state assemblies offer only limited evidence concerning the meaning of the religion clauses.⁹⁶ The most illuminating debates occurred in Virginia, where the House of Delegates and Senate argued for two years over whether the amendments adequately secured individual rights. The Senate objected that the establishment clause restrained Congress only from "passing laws establishing any national religion" and that, unlike the Virginia Declaration of Rights, it did not prevent the "General Government" from preferring "any particular denomination of Christians . . . over others."⁹⁷ Despite these objections, the Senate finally acquiesced and, on December 15, 1791, Virginia became the necessary eleventh state to ratify the Bill of Rights.

The first amendment by its language applied only to the national government, leaving authority over religious matters to the states. In 1845, the Supreme Court affirmed this limitation in *Permoli v. Munic-*

⁹⁴ 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 166 (L. De Pauw ed. 1972) [hereinafter DE PAUW'S FIRST CONGRESS] (Senate Journal, Sept. 9, 1789). On September 3, the Senate had rejected several proposed revisions of the third article, including one that read: "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.* at 151.

⁹⁵ 1 ANNALS, *supra* note 89, at 914 (Sept. 25, 1789).

⁹⁶ The debates are recounted in C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 83, at 143-58.

⁹⁷ JOURNAL OF THE SENATE OF VIRGINIA FOR 1789, *quoted in* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 83, at 145.

ipality No. 1 of New Orleans.⁹⁸ Since it would be almost a century before the Court declared the religion clauses applicable to the states, disestablishment in New England came only after years of conflict.⁹⁹ The growth of religious pluralism and the importuning of dissenters eventually forced disestablishment in Vermont in 1807, Connecticut in 1818, New Hampshire in 1819, and finally, Massachusetts in 1833.

II. THE FOUNDERS ON RELIGIOUS LIBERTY

In deciding religious liberty issues, the Supreme Court has often referred to the views of the Founding Fathers as expressed in the legislative history of the religion clauses, official acts, proclamations, speeches, and correspondence.¹⁰⁰ Although incapable of exact definition, the term "Founding Fathers" commonly refers to the leaders who forged the new nation.¹⁰¹ It frequently is reserved for those who participated in promulgating one or more of three documents: the Declaration of Independence, the Constitution, and the Bill of Rights. Such criteria, while providing helpful guidance, should not be considered all-

⁹⁸ 44 U.S. (3 How.) 589 (1845). In *Permoli*, a Roman Catholic priest who performed a funeral in accordance with his faith was fined under an ordinance that prohibited anyone from exposing a corpse or performing funeral rites in any Catholic church except the specially designated municipal chapel. In rejecting the priest's contention that the free exercise clause shielded his conduct, the Court stated: "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states." *Id.* at 609.

⁹⁹ For the definitive examination of the disestablishment struggle, see W. McLOUGHLIN, *NEW ENGLAND DISSENT*, *supra* note 18. The Reverend Lyman Beecher, one of Connecticut's leading ministers, provides an interesting illustration of the voluntary principle at work. Beecher, a staunch defender of the established church, was initially convinced that disestablishment would destroy both church and state. Later, he concluded that disestablishment was "the best thing that ever happened to the State of Connecticut" and threw the churches "wholly on their own resources and on God." 1 *THE AUTOBIOGRAPHY OF LYMAN BEECHER* 252-53 (B. Cross ed. 1961) (emphasis deleted).

¹⁰⁰ See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) (finding the Founders' appointment of legislative chaplains virtually dispositive in upholding Nebraska's legislative chaplaincy); *Walz v. Tax Comm'n*, 397 U.S. 664, 677-80 (1970) (sustaining a tax exemption for church property, in part because of historical examples dating to the Founders and before); *Everson v. Board of Educ.*, 330 U.S. 1, 8-15 (1947) (interpreting the establishment clause by looking to the historical context in which it was written); see also *infra* notes 156-65 and accompanying text (discussing *Everson*). For the religious views of the Founders in their own writings, see C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 83, at 123-42, 189-203; N. COUSINS, "IN GOD WE TRUST": THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS (1958).

¹⁰¹ See C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 83, at vii & n.*. This Article often refers to the "Founding Fathers" as the "Founders."

inclusive. Jefferson, John Adams, and Samuel Adams made substantial contributions during the nation's formative period, but none was present at the Constitutional Convention. Often used interchangeably with "Founding Fathers," the term "Framers" actually refers to a narrower category, consisting of those who drafted the nation's fundamental law and its particular guarantees. Thus, the Framers of the test oath clause would be limited to the Convention delegates, while the Framers of the first amendment would include the members of the First Congress, or perhaps only the members of the drafting committee.

It is useful to classify the Founders according to their views on religion and society.¹⁰² Although their sentiments ranged from radical deistic separation to a desire for close cooperation between church and state, at least three major groups may be identified: Enlightenment separationists, political centrists, and pietistic separationists.¹⁰³ The views of the Founders fall more on a continuum than in distinct positions, but the categories provide a useful analytical framework.

A. *The Enlightenment Separationists*

Those deeply influenced by the Enlightenment, such as Thomas Paine, Jefferson, and to a lesser extent Madison, approached the issue of church and state suspicious of institutional religion and its potential for corrupting government.¹⁰⁴ They were not necessarily irreligious; indeed, Jefferson and Paine fervently believed in God in a deistic sense, and Madison, while circumspect concerning personal religious beliefs, adhered to views closer to traditional Christian doctrine. While all three saw the necessity of institutional separation, they represented a spectrum of views: from Paine, an extreme separationist, to Madison,

¹⁰² For a helpful synopsis of current schools of thought on church and state, see Professor Carl Esbeck's excellent article, Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371. He identifies five such schools: strict separationists, pluralistic separationists, institutional separationists, non-preferentialists, and restorationists. See *id.* at 375-76.

¹⁰³ Certain parallels can be drawn between these historical classifications and the schools of thought identified by Professor Esbeck. See *id.* Enlightenment separationists would generally correspond to Esbeck's strict separationist position, although Madison probably falls within the pluralistic separationist camp. While some political centrists could be classified as institutional separationists, most would probably fall within the nonpreferentialist position. There is almost a direct correlation between the pietistic tradition and Esbeck's institutional separationists.

¹⁰⁴ See H. COMMAGER, *JEFFERSON, NATIONALISM, AND THE ENLIGHTENMENT* 64 (1975) (noting that to Jefferson "church authority and religious superstition" posed one of the principal threats to freedom of the mind); H. MAY, *THE ENLIGHTENMENT IN AMERICA* at xiv-xvi (1976) (dividing those influenced by the Enlightenment into four general categories and asserting that they repudiated certain religious doctrines on the basis of a world view that itself was religious).

who expressed concern for both true piety and government.

Paine, the fiery agitator and pamphleteer during the Revolution, espoused an anticlerical deism and attacked all institutional religion.¹⁰⁵ In *Common Sense* (1776), he emphasized the duty of government to protect all forms of religious expression. Paine assisted the French revolutionaries in drafting the Declaration of the Rights of Man and Citizen (1789), which also affirmed religious liberty. In *The Rights of Man*, he praised the French for establishing the universal right of conscience, condemning—as he phrased it—the union of church and state as “a sort of mule-animal, capable only of destroying, and not of breeding up.”¹⁰⁶

Jefferson, also deeply influenced by French thought, advocated a more temperate form of separation.¹⁰⁷ An Anglican churchgoer, he denounced Christian doctrine, but adhered to Jesus’ moral code as the “most perfect and sublime that has ever been taught by man.”¹⁰⁸ As revealed by his epitaph, Jefferson regarded the Declaration of Independence, the founding of the University of Virginia, and the Bill for Establishing Religious Freedom as his greatest achievements—notably omitting his service as President.¹⁰⁹ Despite its stature, Jefferson’s Bill for Establishing Religious Freedom has been overshadowed in constitutional jurisprudence by his remark in a letter to the Danbury Baptists in 1802 that the religion clauses built “a wall of separation between church and State.”¹¹⁰ Serving as Minister to France from 1785 to 1789,

¹⁰⁵ For biographies of Paine, see D. HAWKE, *PAINE* (1974); W. WOODWARD, *TOM PAINE: AMERICA’S GODFATHER 1737-1809* (1945). Paine’s works are collected in *THE COMPLETE WRITINGS OF THOMAS PAINE* (P. Foner ed. 1945) (two vols.) [hereinafter *WRITINGS OF PAINE*].

¹⁰⁶ T. PAINE, *THE RIGHTS OF MAN* (pts. 1 & 2) (London 1791, 1792), in 1 *WRITINGS OF PAINE*, *supra* note 105, at 292.

¹⁰⁷ The definitive biography is the six-volume, multi-titled work, D. MALONE, *JEFFERSON AND HIS TIME* (1948-81). M. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* (1970), is a good one-volume account. For an insightful article on Jefferson’s views concerning church and state, see Little, *The Origins of Perplexity: Civil Religion and Moral Belief in the Thought of Thomas Jefferson*, in *AMERICAN CIVIL RELIGION* 185 (R. Richey & D. Jones eds. 1974). Jefferson’s writings are collected in *PAPERS OF JEFFERSON*, *supra* note 63. This definitive compilation, projected to require sixty volumes, was begun in 1950. At present, the series is complete only through the early 1790s. References to Jefferson’s works after that are to *THE WRITINGS OF THOMAS JEFFERSON* (H. Washington ed. 1853) [hereinafter *WRITINGS OF JEFFERSON*].

¹⁰⁸ Letter from Thomas Jefferson to Dr. Benjamin Rush (Apr. 21, 1803), in 4 *WRITINGS OF JEFFERSON*, *supra* note 107, at 482 (Syllabus of an Estimate of the Merit of the Doctrines of Jesus, compared with those of others).

¹⁰⁹ A brief discussion appears in 6 D. MALONE, *THE SAGE OF MONTICELLO*, *supra* note 107, at 499 (1981).

¹¹⁰ Reply to the Danbury Baptist Association (Jan. 1, 1802), in 8 *WRITINGS OF JEFFERSON*, *supra* note 107, at 113. Immediately after announcing the wall metaphor,

Jefferson participated in neither the Constitutional Convention nor the First Congress. Given that he was not a Framers, it is perhaps surprising that the Supreme Court adopted his controversial "wall of separation" metaphor as descriptive of the clauses.¹¹¹ While President, Jefferson broke with tradition by refusing to issue religious proclamations because he considered the national government "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises."¹¹² As a state legislator, however, he participated in a comprehensive revision of Virginia's laws, which included: A Bill for Punishing Disturbers of Religious Worship and Sabbath

Jefferson stated:

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.

Id. The wall metaphor has had a long and controversial history. Critics of the metaphor stress that constitutional interpretation should focus on the first amendment's actual wording, rather than on a literary comparison used by one Founder in a personal letter. For criticisms of the wall metaphor, see R. MICHEALSEN, PIETY IN THE PUBLIC SCHOOL 216 (1970) (noting that, to the layman, the phrase presents an "unfortunate, albeit dramatically effective, metaphor"); Hutchins, *The Future of the Wall*, in *THE WALL BETWEEN CHURCH AND STATE* 17, 18 (D. Oaks ed. 1963) (stating that "words appearing in what may have been a routine acknowledgement of a complimentary address" should not be accorded such weight); Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 845 (1954) (stating that "[t]he wall-of-separation metaphor is hardly apt as a description of" the relationship between church and state). On the other hand, some scholars enthusiastically support the metaphor; see L. PFEFFER, *supra* note 58, at 131-35 (arguing that the *Everson* Court's adoption of the wall metaphor accords with history and sound constitutional doctrine); Konvitz, *Separation of Church and State: The First Freedom*, 14 LAW & CONTEMP. PROBS. 44, 46, 57 (1949) (arguing that the wall metaphor accurately and effectively expresses America's constitutional heritage of church-state relations).

¹¹¹ The Court first referred to the Danbury letter and Jefferson's wall in *Reynolds v. United States*, 98 U.S. 145, 164 (1879). In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the Court raised the figure of speech to constitutional status, asserting that the "First Amendment has erected a wall between church and state" that "must be kept high and impregnable." *Id.* at 18. The Court reaffirmed this view in *McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948). *Zorach v. Clauson*, 343 U.S. 306 (1952), retreated from this position, suggesting that the "common sense of the matter" was that the wall did not effect separation "in every and all respects." *Id.* at 312. By 1971, when the Court announced the tripartite establishment clause test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), "the line of separation, far from being a 'wall,' had become 'a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" *Id.* at 614. More recently, Justice Stevens lamented that corrosive precedents had indeed reduced the wall to a "blurred, indistinct, and variable barrier." *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting). While Justice Stevens sought to rebuild the wall, Justice Rehnquist urged its complete demolition. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), he asserted in dissent that the wall metaphor is "based on bad history," and "has proved useless as a guide to judging." *Id.* at 107 (Rehnquist, J., dissenting).

¹¹² Letter from Thomas Jefferson to the Rev. Millar (Jan. 23, 1808), in 5 WRITINGS OF JEFFERSON, *supra* note 107, at 236-37.

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.¹¹³ Perhaps Jefferson's disparate actions on the state and federal levels can be reconciled by reference to the principle of federalism.¹¹⁴

Among the Founders who espoused Enlightenment separation, Madison manifested the most concern for protecting the purity of both government and institutional religion.¹¹⁵ He differed from Jefferson in deriving religious liberty primarily from divine will, rather than political utility.¹¹⁶ No Founder contributed to the cause of religious liberty more than Madison, who is considered the chief architect of the Constitution and prime drafter of the Bill of Rights.¹¹⁷ He regarded liberty of conscience as the most sacred inalienable right and devoted his greatest efforts to securing its protection. As a Virginia legislator, he insured that the Virginia Declaration of Rights guaranteed the free exercise of religion, not merely toleration, greatly contributed to the defeat of the Assessment Bill with his monumental *Memorial and Remonstrance*, and secured passage of Jefferson's Bill for Establishing Religious Freedom.

¹¹³ These bills are reprinted in 2 PAPERS OF JEFFERSON, *supra* note 63, at 555-58.

¹¹⁴ For an analysis of Jefferson's political philosophy and the issue of federalism, see Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645, 673-74 (maintaining that Jefferson regarded the states as constitutionally free "to develop what they deemed to be the proper relationship with religion," and that he developed a standard of "impartial accommodation" in Virginia); see also *infra* note 206 and accompanying text (discussing Jefferson's belief that the state governments, not the federal government, exercised a degree of civil authority in religious matters).

¹¹⁵ For an exhaustive biography, see the six-volume work, I. BRANT, JAMES MADISON (1941-61). Good one-volume biographies include R. KETCHAM, JAMES MADISON (1971) and R. RUTLAND, JAMES MADISON: THE FOUNDING FATHER (1987). Madison's public and private papers were first collected in WRITINGS OF MADISON, *supra* note 36 (nine vols.). This will be superseded by PAPERS OF MADISON, *supra* note 59, a collection that is now complete through the early 1790s.

¹¹⁶ See Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 786 (1986).

¹¹⁷ It is generally assumed that Madison authored the religion clauses. The evidence for this belief, however, is ambiguous, particularly given the fact that a joint committee produced the present wording. See, e.g., C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 83, at 131 ("there is no present basis for assuming that [the first amendment] was the work of Madison"); 1 A. STOKES, *supra* note 17, at 548 (although "generally accredited to Madison," "there is no positive evidence as to who composed the final draft" of the religion clauses); Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 11-13 (1949) (arguing that Madison was not the author of the first amendment in its final form); Drakeman, *Religion and the Republic: James Madison and the First Amendment*, in JAMES MADISON ON RELIGIOUS LIBERTY 231, 234 (R. Alley ed. 1985) ("Did Madison draft the language of the religion clauses that were adopted? Probably not.").

On the national level, Madison pressed for a bill of rights in the First Congress and served on the committee that drafted the first amendment. As President, he demonstrated his commitment to separation of church and state when he vetoed bills incorporating the Episcopal Church in Washington, D.C. and reserving federal land for a Baptist Church.¹¹⁸ With some misgivings, however, Madison yielded to the precedent set by Washington and issued three proclamations recommending public humiliation and prayer and one recommending a day of thanksgiving "to Almighty God for His great goodness."¹¹⁹ In 1822, after his presidency, he wrote that America was teaching the world that "Religion flourishes in greater purity, without than with the aid of Gov[ernmen]t."¹²⁰ In retirement, Madison argued for complete separation between Christianity and government and maintained that the establishment clause prohibited presidential religious proclamations, as well as congressional and military chaplains.¹²¹

At least two cardinal themes emerge from his writings on church and state: first, religious freedom is most easily guarded in a country with a multiplicity of sects and, second, "a perfect separation between ecclesiastical and civil matters" should be maintained because "religion & Gov[ernmen]t will both exist in greater purity, the less they are mixed together."¹²² Though distrustful of institutional religion, Madison remained an Episcopalian throughout his life and maintained strong religious convictions. He wrote in 1825 that "belief in a God All Powerful wise & good, is so essential to the moral order of the World & to the happiness of man, that arguments which enforce it cannot be drawn from too many sources."¹²³

B. *The Political Centrists*

Although the Supreme Court has stressed the Enlightenment tra-

¹¹⁸ These veto messages to the House, dated February 21, 1811, and February 28, 1811, respectively, are reprinted in 1 J. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1908*, at 489-90 (1908).

¹¹⁹ For the text of these proclamations, see 1 J. RICHARDSON, *supra* note 118, at 513 (July 9, 1812); *id.* at 532-33 (July 23, 1813); *id.* at 558 (Nov. 16, 1814); *id.* at 560-61 (Mar. 4, 1815) (thanksgiving proclamation).

¹²⁰ Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *WRITINGS OF MADISON*, *supra* note 36, at 103.

¹²¹ See Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 558-62 (3d ser. 1946).

¹²² Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *WRITINGS OF MADISON*, *supra* note 36, at 102. For a discussion of Madison's views on the "multiplicity of sects," see *infra* notes 216-18 and accompanying text.

¹²³ Letter from James Madison to Frederick Beasley (Nov. 20, 1825), in 9 *WRITINGS OF MADISON*, *supra* note 36, at 230.

dition of religious separation, historical evidence suggests that this tradition was not the predominant position among the Founders. Most, including George Washington, John Adams, Benjamin Franklin, Patrick Henry, the Carrolls of Maryland, and John Marshall, believed that religion was an essential cornerstone for morality, civic virtue, and democratic government.

Perhaps most representative of this centrist position was Washington, who commanded the greatest respect among the Founders and seemed to embody the popular consensus concerning the interaction of religion and government.¹²⁴ He believed "that *Religion* and *Morality* are the essential pillars of Civil society" and affirmed that every one should be "protected in worshipping the Deity according to the dictates of their consciences."¹²⁵ As commander of the Continental Army, Washington ordered soldiers to attend public worship, prohibited "pro-fane cursing," and directed regimental commanders to procure chaplains.¹²⁶ During his presidency, Washington established a precedent by issuing the first thanksgiving day proclamation after the adoption of the Constitution. He repeatedly acknowledged the Deity in official pronouncements, invoking in his First Inaugural Address the assistance of "that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect."¹²⁷ In proclaiming "A National Thanksgiving" in 1789, Washington urged the people to thank that "great and glorious Being . . . for the civil and religious liberty with which we are blessed," and in his Farewell Address in 1796, he counseled that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."¹²⁸

¹²⁴ Biographies include J. ALDEN, *GEORGE WASHINGTON: A BIOGRAPHY* (1984) and J. FLEXNER, *GEORGE WASHINGTON* (1965-72) (four vols.). Also helpful are P. BOLLER, *GEORGE WASHINGTON AND RELIGION* (1963) and G. NORDHAM, *GEORGE WASHINGTON AND THE LAW* (1982). A new collection of Washington's writings, presently in progress, is *THE PAPERS OF GEORGE WASHINGTON* (W. Abbot ed. 1983). The earlier collection is *THE WRITINGS OF GEORGE WASHINGTON* (J. Fitzpatrick ed. 1931-44) [hereinafter *WRITINGS OF WASHINGTON*].

¹²⁵ The first quotation is found in Letter from George Washington to the clergy of Philadelphia (Mar. 3, 1797), in 35 *WRITINGS OF WASHINGTON*, *supra* note 124, at 416; the second quotation is found in Letter from George Washington to the General Assembly of Presbyterian Churches (n.d.), in 30 *WRITINGS OF WASHINGTON*, *supra* note 124, at 336 n.12 (writing in response to an address from the General Assembly of May 26, 1789).

¹²⁶ The orders are reprinted in N. COUSINS, *supra* note 100, at 50-52.

¹²⁷ First Inaugural Address by George Washington (Apr. 30, 1789), in 1 J. RICHARDSON, *supra* note 118, at 52.

¹²⁸ Proclamation: A National Thanksgiving (Oct. 3, 1789), in 1 J. RICHARDSON, *supra* note 118, at 64; Farewell Address by George Washington (Sept. 17, 1796), in 1 J. RICHARDSON, *supra* note 118, at 220. Washington issued a second thanksgiving

The nation's second president, John Adams, stressed theistic natural law and the importance of Christianity in public life.¹²⁹ Emphasizing that "we have no government armed with power capable of contending with human passions unbridled by morality and religion," he stated in 1798: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."¹³⁰ While influenced by a broadly Puritan upbringing, Adams denounced institutional religion's dogma and intolerance, but defended the Massachusetts Congregational establishment as necessary for social stability. As President, he issued proclamations for two national fast days, emphasizing dependence on God as essential for the "promotion of that morality and piety without which social happiness can not exist nor the blessings of a free government be enjoyed."¹³¹

In the face of strong anti-Catholic prejudice, the Carroll family of Maryland showed their commitment to the place of religion in the new nation by securing public acceptance of the Roman Catholic Church.¹³² Charles Carroll signed the Declaration of Independence, sat in the First Congress, and participated on the committee that drafted the first

proclamation on January 1, 1795, which is reprinted in 1 J. RICHARDSON, *supra* note 118, at 179-80.

One of Washington's most famous statements on religious freedom occurred in a reply to the Jewish Congregation of Newport:

It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.

Letter from George Washington to the Hebrew Congregation of Newport (Aug. 17, 1792), in 31 WRITINGS OF WASHINGTON, *supra* note 124, at 93 n.65.

¹²⁹ Recent biographies of Adams include R. BROWN, *THE PRESIDENCY OF JOHN ADAMS* (1975); R. EAST, *JOHN ADAMS* (1979); P. SMITH, *JOHN ADAMS* (1962) (two vols.). For Adams' writings, see *THE WORKS OF JOHN ADAMS* (C. Adams ed. 1850-56 & reprint 1971) [hereinafter *WORKS OF J. ADAMS*]. This edition also contains a biography by his grandson, Charles Francis Adams. A modern edition of Adams' writings, presently under way, is *PAPERS OF JOHN ADAMS* (R. Taylor ed. 1977).

¹³⁰ Letter from John Adams to a unit of the Massachusetts militia (Oct. 11, 1798), in 9 *WORKS OF J. ADAMS*, *supra* note 129, at 229.

¹³¹ The first proclamation, quoted above, was issued on March 23, 1798. It is reprinted in 1 J. RICHARDSON, *supra* note 118, at 268-70. The second proclamation, issued on March 6, 1799, is reprinted in *id.* at 284-86.

¹³² For biographies of the Carroll family, see M. GEIGER, *DANIEL CARROLL: A FRAMER OF THE CONSTITUTION* (1943); T. HANLEY, *CHARLES CARROLL OF CARROLLTON: THE MAKING OF A REVOLUTIONARY GENTLEMAN* (1970); E. SMITH, *CHARLES CARROLL OF CARROLLTON* (1942). On the contributions of Roman Catholicism to America, see J. ELLIS, *CATHOLICS IN COLONIAL AMERICA* (1965); J. HENNESEY, *AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES* (1981). Important documents are reprinted in *DOCUMENTS OF AMERICAN CATHOLIC HISTORY* (J. Ellis 4th ed. 1987).

amendment. His cousin Daniel signed the Constitution and, as a member of the First Congress, urged a religious freedom guarantee because "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand."¹³³ John Carroll, Daniel's brother, became America's first Roman Catholic Bishop, accommodating the Church to the nation's religious pluralism and counseling toleration towards other Christians.

Two of the most influential Supreme Court justices in the early years of the nation, Chief Justice John Marshall and Justice Joseph Story, also believed that religion was essential for the survival of the republic.¹³⁴ In a letter to the Reverend Jasper Adams in 1833, Marshall stressed the close relation of Christianity to civil government:

The American population is entirely Christian, & with us, Christianity & Religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it. Legislation on the subject is admitted to require great delicacy, because freedom of conscience & respect for our religion both claim our most serious regard.¹³⁵

Story disputed Jefferson's contention that Christianity was not part of the common law, arguing in his monumental *Commentaries on the Constitution* that the Christian religion provided "the great basis, on which [the republic] must rest for its support and permanence."¹³⁶ According to Story, the real object of the religion clauses was "to exclude all rivalry among Christian sects, and to prevent any national ecclesias-

¹³³ 1 ANNALS, *supra* note 89, at 730 (Aug. 15, 1789).

¹³⁴ For Marshall's views, see L. BAKER, JOHN MARSHALL: A LIFE IN LAW 95 (1974) (reporting Marshall's observations of instances in which the church held communities together and was instrumental in their government). An exhaustive account of Marshall's life, which unfortunately contains little concerning his religious views, is A. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1916-19) (four vols.). On Story's views, see J. McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 21 (1971) (stating that Story believed "Christianity necessary to the support of civil society"); R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 183 (1985) ("[T]he state should promote the religious beliefs of individuals, for, no less than property rights, they were the foundation of republican social order.").

¹³⁵ Letter from John Marshall to Jasper Adams (May 9, 1833) (available in University of Michigan Library). Marshall was responding to a sermon by the Rev. Jasper Adams, which argued that the American people "have retained the Christian religion as the foundation of their civil, legal and political institutions; while they have refused to continue a legal preferenc[e] to any one of its forms over any other." See J. ADAMS, THE RELATION OF CHRISTIANITY TO CIVIL GOVERNMENT IN THE UNITED STATES 12-13 (Charleston 1833) (emphasis deleted).

¹³⁶ 3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1867, at 724 (Boston 1833).

tical establishment, which should give to an hierarchy the exclusive patronage of the national government."¹³⁷

Oliver Ellsworth of Connecticut, a Framers of the first amendment and later Chief Justice of the Supreme Court, agreed with political centrists and pietistic separationists on the role of religion in the republic.¹³⁸ Defending the federal ban on test oaths, he called religious tests the "parent of hypocrisy" and stressed that "[c]ivil government has no business to meddle with the private opinions of the people."¹³⁹ According to Ellsworth, the test oath ban was intended to exclude persecution and to secure religious liberty. He conceded, however, that government could interfere in religious matters to "punish gross immoralities and impieties," including "profane swearing, blasphemy, and professed atheism."¹⁴⁰

C. *The Pietistic Separationists*

The third major position among the Founders followed the example of Williams and Penn in aggressively defending religious liberty as vital to authentic faith and the purity of the church.¹⁴¹ This theologically grounded tradition affirmed that "God has appointed two kinds of government . . . which are distinct in their nature and ought never to be confounded together."¹⁴² This is not to suggest, however, that advocates of pietistic separation conceived of a secular society or even a secular government; rather, they felt that government should foster an environment conducive to religious faith and practice.¹⁴³ The Supreme Court, at least in its earlier decisions, largely overlooked this tradition, perhaps because pietistic separationists generally were members of dis-

¹³⁷ *Id.* § 1871, at 728.

¹³⁸ One of the few accounts of his life is W. BROWN, *THE LIFE OF OLIVER ELLSWORTH* (1905).

¹³⁹ Ellsworth, *Landholder*, No. 7 (Dec. 17, 1787), reprinted in 4 *FOUNDERS' CONSTITUTION*, *supra* note 76, at 640.

¹⁴⁰ *Id.*

¹⁴¹ For an examination of pietistic separation by a legal scholar, see M. HOWE, *supra* note 17. The importance of this tradition is emphasized in W. McLOUGHLIN, *NEW ENGLAND DISSENT*, *supra* note 18, and W. McLOUGHLIN, *ISAAC BACKUS AND THE AMERICAN PIETISTIC TRADITION* (1967) [hereinafter W. McLOUGHLIN, *ISAAC BACKUS*]. In referring to this tradition, we have adopted Professor McLoughlin's term "pietistic" rather than Professor Howe's term "evangelical" in order to avoid confusion with contemporary Protestant Evangelicalism.

¹⁴² I. BACKUS, *AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY* (Boston 1773), in *ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-1789*, at 308, 312 (W. McLoughlin ed. 1968) [hereinafter W. McLOUGHLIN, *PAMPHLETS*].

¹⁴³ The foremost advocates of pietistic separation in the early colonial period were Williams, Clarke, and Penn. See *supra* notes 17-27 and accompanying text.

senting religious groups and therefore not well represented at the Convention. Pietists, however, provided essential political support for leaders such as Madison and were well represented in state ratifying conventions.

The leading advocate of this tradition in the revolutionary and early national periods was the Baptist minister Isaac Backus, who rediscovered Williams' thought, expounded a comprehensive theological basis for separation, and worked tirelessly to disestablish Congregationalism in New England.¹⁴⁴ In contrast to either church domination of the state or state domination of the church, both of which were present in New England's history, Backus proposed a third alternative: a government of Christian magistrates who limited themselves to the civil sphere and left the clergy to spiritual functions. Commenting on the role of civil and religious leaders, he remarked, "there may and ought to be a sweet harmony between them; yet as there is a great difference between the nature of their work, they never ought to have *such a union* together" as was found in New England.¹⁴⁵

Backus' view of pietistic separation can be seen clearly in his political activity. At the request of a delegate to the Massachusetts constitutional convention of 1778, Backus drafted a bill of rights that mirrored the Virginia Declaration of Rights in important respects. The proposed draft differed significantly on freedom of conscience, however, due to his theological presuppositions:

As God is the only worthy object of all religious worship, and nothing can be true religion but a voluntary obedience unto his revealed will, of which each rational soul has an equal right to judge for itself, every person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby.¹⁴⁶

Thus, to Backus religious freedom was a means of ensuring the voluntary worship of God. The convention did not adopt his draft, deciding instead to protect its establishment by mandating public taxation for the support of the Congregational churches. As a delegate to the Massa-

¹⁴⁴ For biographical information on Backus, see W. McLoughlin, *NEW ENGLAND DISSENT*, *supra* note 18; W. McLoughlin, *ISAAC BACKUS*, *supra* note 141; W. McLoughlin, *PAMPHLETS*, *supra* note 142.

¹⁴⁵ I. BACKUS, *A FISH CAUGHT IN HIS OWN NET* (Boston 1768), in W. McLoughlin, *PAMPHLETS*, *supra* note 142, at 190-91.

¹⁴⁶ A Declaration of the Rights, of the Inhabitants of the State of Massachusetts-Bay, in *New-England* (1779) (proposed draft by Isaac Backus), in W. McLoughlin, *PAMPHLETS*, *supra* note 142, app. 3, at 487.

chusetts ratifying convention of 1788, Backus supported the Federal Constitution despite Antifederalist convictions because of the provision in article VI banning religious test oaths.¹⁴⁷ Although an advocate of separation of church and state and a political supporter of Jefferson in the 1800 presidential election, he did not desire the secular state envisioned by Jefferson. To the contrary, Backus expressed no opposition to Sabbath laws, teaching Calvinistic doctrine in the public schools, proscribing blasphemy, and conducting official days of fasting and prayer.¹⁴⁸

Another Founder who championed pietistic separation was John Witherspoon, the only member of the clergy to sign the Declaration of Independence.¹⁴⁹ In his wartime sermon, *The Dominion of Providence over the Passions of Men*, Witherspoon pointed out: "There is not a single instance in history in which civil liberty was lost, and religious liberty preserved entire."¹⁵⁰ While president of the College of New Jersey, later Princeton University, Witherspoon served as Madison's mentor in law and ethics. In his lectures on moral philosophy, he emphasized that the civil magistrate should "promote true religion [as] the best and most effectual way of making a virtuous and regular people."¹⁵¹ While magistrates should not coerce belief in religion, they ought to "encourage piety by [their] own example"; "defend the rights of conscience"; and "enact laws for the punishment of acts of profanity and impiety."¹⁵² Witherspoon left an indelible imprint on the political life of the nation, serving as a congressman for six years, a state legislator for two terms, and a delegate to the New Jersey convention that ratified the Federal Constitution.

Evidence also suggests that Roger Sherman of Connecticut was an important advocate of the pietistic tradition. Deeply influenced by the theological views of Jonathan Edwards, Sherman was for many years a leading deacon of the evangelical church at New Haven and published several sermons on religious questions.¹⁵³ In the Continental Congress,

¹⁴⁷ See *supra* note 77 and accompanying text.

¹⁴⁸ McLoughlin, *Introduction* to W. McLoughlin, *PAMPHLETS*, *supra* note 142, at 49-52.

¹⁴⁹ His life is recounted in V. COLLINS, *PRESIDENT WITHERSPOON* (1925 & reprint 1969) (two vols.) and M. STOHLMAN, *JOHN WITHERSPOON: PARSON, POLITICIAN, PATRIOT* (1976). For his writings, see *THE WORKS OF THE REV. JOHN WITHERSPOON* (2d ed. Philadelphia 1802) (four vols.) [hereinafter *WORKS OF WITHERSPOON*].

¹⁵⁰ J. WITHERSPOON, *THE DOMINION OF PROVIDENCE OVER THE PASSIONS OF MEN* (Philadelphia 1776), in 3 *WORKS OF WITHERSPOON*, *supra* note 149, at 37.

¹⁵¹ J. WITHERSPOON, *LECTURES ON MORAL PHILOSOPHY* 159 (J. Scott ann. ed. 1982).

¹⁵² *Id.* at 160-61.

¹⁵³ Unfortunately, Sherman's private papers have been lost, but his support for

he served on a committee which drafted instructions for a diplomatic mission to Canada in 1776. The committee instructed the delegation to emphasize that if Canada joined the confederation of states, its predominantly Catholic citizens would enjoy the free exercise of religion, "provided, however, that all other denominations of Christians be equally entitled to hold offices and enjoy civil privileges and the free exercise of their religion and be totally exempt from the payment of any tythes or taxes for the support of any religion."¹⁵⁴ A signer of the Declaration of Independence, the Articles of Confederation, and the Constitution, he also served on the committee that framed the first amendment. He persuaded the First Congress to append the amendments as separate articles rather than incorporating them into the text of the Constitution, as was suggested by Madison.¹⁵⁵

D. *Summary*

The spectrum of views expressed by the Founders on religion and government may be classified for heuristic purposes into three groups: Enlightenment separation, political centrist, and pietistic separation. All three traditions contributed to the historical meaning of the religion clauses, and all three are therefore relevant for constitutional interpretation. Any attempt to reduce the Founders' views to one position or to read the beliefs of certain Founders, no matter how prominent, into the first amendment is likely to produce indefensible and culturally unacceptable results.

All three traditions were committed to the ideal of religious liberty, but they approached the issue from different perspectives. Both Enlightenment and pietistic separationists worked, often with great

thanksgiving proclamations and adherence to evangelical religion suggest his affinities to pietistic separation. During the Constitutional Convention, for example, Sherman seconded Franklin's motion to have local clergy open the assembly's deliberations each morning by "imploping the assistance of Heaven." 1 FARRAND'S RECORDS, *supra* note 75, at 452 (Madison, June 28, 1787). He served as a deacon of the White Haven Church in New Haven, pastored by Jonathan Edwards, Jr. For copies of several of Sherman's letters discussing religion, see R. FERM, JONATHAN EDWARDS THE YOUNGER: 1745-1801 at 139-44 (1976).

For additional information on Sherman, see R. BOARDMAN, ROGER SHERMAN: SIGNER AND STATESMAN 319 (1938) (pointing out that Sherman's "faith in the new republic was largely because he felt it was founded on Christianity as he understood it."); C. COLLIER, ROGER SHERMAN'S CONNECTICUT: YANKEE POLITICS AND THE AMERICAN REVOLUTION 323-29 (Sherman staunchly supported "New Light" revivalism, yet he also counseled toleration and conciliation towards "Old Light" ministers and congregants).

¹⁵⁴ 1 A. STOKES, *supra* note 17, at 460-61 (quoting the committee of the Continental Congress consisting of Sherman, John Adams, and George Wythe).

¹⁵⁵ See 1 ANNALS, *supra* note 89, at 707-08 (Aug. 13, 1789).

zeal, to separate church and state in an institutional sense. Those deeply influenced by the Enlightenment, such as Paine and Jefferson, adhered to anticlerical views and focused on insulating government from religious domination. Madison shared this focus somewhat, but tempered it with a concern for protecting the purity of religious belief and practice. Those Founders espousing pietistic separation, most prominently Witherspoon, Backus, and Sherman, inherited the emphasis of Williams and Penn on protecting religion from the corrupting effect of governmental interference. Political centrists such as Washington and John Adams approached the issue of church and state in more pragmatic terms. Less concerned than the separationists with the specific means of attaining religious liberty, they regarded religion as an essential source of personal and social morality and, when in office, openly and repeatedly recognized its importance in the nation's public life. Although the Founders represented a broad spectrum of views, they were virtually unanimous in the belief that the republic could not survive without religion's moral influence. Consequently, they did not envision a secular society, but rather one receptive to voluntary religious expression.

III. THE ANIMATING PRINCIPLES OF THE RELIGION CLAUSES

After examining the growth of American religious liberty, the framing of the religion clauses, and the views of the Founders, it is appropriate to ask what guidance history affords in construing the clauses and, more fundamentally, how useful history is in resolving current issues pertaining to church and state. Before addressing these questions, it would be helpful to examine briefly the Supreme Court's resort to history.

The Court's heavy reliance on history in deciding religious liberty questions is seen most clearly in *Everson v. Board of Education*,¹⁵⁶ the seminal decision in 1947 that sustained state reimbursement for the bus fares of parochial school children. After holding that the establishment clause applied to the states through the fourteenth amendment due process clause, the Court briefly recounted the rise of religious liberty in America, focusing in particular on the Virginia struggle. Invoking Jefferson's wall of separation metaphor, Justice Black's opinion for the Court announced an expansive reading of the establishment clause: "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . .

¹⁵⁶ 330 U.S. 1 (1947).

No tax in any amount, large or small, can be levied to support any religious activities or institutions"¹⁵⁷ Relying on a public welfare rationale, however, the Court concluded that the New Jersey bus law did not breach the "high and impregnable" wall between church and state.¹⁵⁸

In a dissenting opinion joined by Justices Frankfurter, Jackson, and Burton, Justice Rutledge discussed the Virginia episode at length and agreed with the majority that the establishment clause erected Jefferson's wall. He thought it clear, however, that the bus law violated the clause, which he read to forbid "any appropriation, large or small, from public funds to aid or support any and all religious exercises."¹⁵⁹ Thus, all nine Justices agreed that the establishment clause erected a wall of separation, but the dissenters asserted that the majority had misapplied this principle.

Everson evoked widespread and diverse commentary. Scholars challenged the manner in which the justices employed history and disputed the Court's historical conclusions.¹⁶⁰ They criticized the Court for making the establishment clause applicable to the states,¹⁶¹ relying almost exclusively on Jefferson, Madison, and the Virginia struggle,¹⁶²

¹⁵⁷ *Id.* at 15-16.

¹⁵⁸ *Id.* at 18.

¹⁵⁹ *Id.* at 41 (Rutledge, J., dissenting).

¹⁶⁰ An excellent analysis of *Everson*, including a review of the historical criticisms, can be found in Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 ARIZ. L. REV. 307 (1973).

¹⁶¹ Professor Edward Corwin asserted, for example, that "[s]o far as the Fourteenth Amendment is concerned, States are entirely free to establish religions, provided they do not deprive anybody of religious liberty." E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 114 (1951) (emphasis deleted); see also P. FREUND, THE SUPREME COURT OF THE UNITED STATES 58-59 (1961) ("What does not seem so inevitable is the inclusion within the Fourteenth Amendment of the concept of nonestablishment of religion in the sense of forbidding nondiscriminatory aid to religion, where there is no interference with freedom of religious exercise."); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371, 389, 397-407 (arguing that, because one of the primary purposes of the establishment clause was to preclude federal interference with state religious establishments, incorporation turned the clause on its head by transforming it into a vehicle for expansive federal interference in state religious matters).

¹⁶² See, e.g., J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 194-95 (1949) (arguing that the importance attached by Justices Black and Rutledge to the Virginia struggle is "invalid"); Corwin, *supra* note 117, at 13 (stating that Justice Rutledge's reliance on Madison's *Memorial and Remonstrance* "as interpretive of the First Amendment [was] obviously excessive"); Kauper, *supra* note 160, at 318-19 ("It would be a mistake . . . to interpret the establishment clause wholly in terms of what Madison and Jefferson thought."); Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 27 (1949) (arguing that history contradicts the view that the religion clauses incorporated the "total personal ideology of James Madison"); Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 318-22 (1986) (asserting

failing to analyze the legislative history of the religion clauses,¹⁶³ ignoring the theological roots of American religious liberty,¹⁶⁴ and adopting a broad construction of the establishment clause.¹⁶⁵

More recently, the use of history in constitutional interpretation sparked a debate between then Attorney General Edwin Meese and Justice William Brennan. Meese, an advocate of the originalist position, criticized the Court for ignoring the intent of the Framers, asserting that they would find the "strict neutrality" doctrine used in church and state cases "somewhat bizarre." Justice Brennan responded that the original intent theory was premised on "facile historicism" and constituted "arrogance cloaked as humility."¹⁶⁶ Several years earlier, in a dissenting opinion in *Marsh v. Chambers*,¹⁶⁷ Justice Brennan had stressed that "the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers."¹⁶⁸ Rather, proper respect for the Framers demands that the Court

that the *Everson* Court erred in relying solely on Madison and Jefferson and in equating the views that animated the Virginia struggle with those that inspired the religion clauses).

¹⁶³ See, e.g., R. CORD, SEPARATION, *supra* note 88, at 121-22 (characterizing as "unbelievable" the *Everson* Court's distorted view of Madison and Jefferson and failure to explore the legislative history of the establishment clause). Not until Justice Rehnquist's dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985), did a Justice examine the legislative history in any detail. See *id.* at 91-114 (Rehnquist, J. dissenting).

¹⁶⁴ See, e.g., M. HOWE, *supra* note 17, at 6 (asserting that the Court's adoption of the Jeffersonian tradition of separation caused it to disregard the theological roots of the religion clauses—the tradition of religious liberty espoused by Roger Williams).

¹⁶⁵ See, e.g., R. CORD, SEPARATION, *supra* note 88, at 15 (arguing that the religion clauses were intended to prevent establishment of a national church, secure freedom of conscience against invasion by the federal government, and prevent federal interference with state authority in religious matters); Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROBS. 61, 70-71 (1949) (arguing that the first amendment was not intended to ban nonpreferential aid to religion). Although heavily criticized, the Black-Rutledge formula of broad separation has received support from a number of prominent scholars, including Leonard Levy, Leo Pfeffer, and Milton Konvitz. See *supra* notes 88 & 110.

¹⁶⁶ The debate, including the quoted language above, is recounted in Kaufman, *What Did the Founding Fathers Intend?*, N.Y. Times, Feb. 23, 1986, § 6 (Magazine), at 42.

¹⁶⁷ 463 U.S. 783 (1983) (holding that Nebraska's legislative chaplaincy does not violate the establishment clause).

¹⁶⁸ *Id.* at 816 (Brennan, J., dissenting). Justice Brennan conceded in *Marsh* that his previous endorsement of legislative prayer, see *Abington School Dist. v. Schempp*, 374 U.S. 203, 299-300 (1963) (Brennan, J., concurring), was "wrong." See *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting). He also appears to have retreated from the historical methodology endorsed in his *Schempp* opinion, in which he said: "Specifically, I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Schempp*, 374 U.S. at 294 (Brennan, J., concurring).

look to "broad purposes, not specific practices."¹⁶⁹

We are neither as optimistic as Edwin Meese that courts can find detailed answers in the often enigmatic history known as the "Framers' intent," nor as pessimistic as Justice Brennan that modern America has changed so markedly that the generating history of the religion clauses and the Framers' beliefs and actions afford only ambiguous guidance.¹⁷⁰ While the Constitution is a living document, a broadly framed plan to guide future generations, it must be interpreted in the context of its history and the traditions and values of the American people. Thus, although history does not supply a detailed blueprint, it does provide an essential framework for resolving modern religious liberty questions. In interpreting the Constitution, one must look to its underlying ideas and identify the Founders' "broad purposes." These "animating" principles ensure that judges do not read their own ideological views into our fundamental law. At the same time, they are not so outmoded that they prevent the enlightened resolution of twentieth-century problems. What then are the animating principles that inspired the religion clauses?¹⁷¹

A. *The Core Value of Religious Liberty*

In addressing this question, we begin with what may seem a rather obvious proposition—that the Founders intended the establishment and free exercise clauses to be complementary co-guarantors of a single end. As Justice Goldberg observed in *Schempp*, the Bible-reading case, the "single end" of the clauses is "to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end."¹⁷² While this may appear manifest, some scholars assert that the

¹⁶⁹ *Marsh*, 463 U.S. at 816 (Brennan, J., dissenting) (quoting *Schempp*, 374 U.S. at 241 (Brennan, J., concurring)).

¹⁷⁰ For works recognizing the importance of history in interpreting the religion clauses, see J. MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (1960); A. REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* (1985); R. SMITH, *supra* note 88, at 1-13; McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Van Patten, *supra* note 32. For works discussing the use of history in law that are not necessarily consistent with this article, see B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51-58 (1921); C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964); Wyzanski, *History and Law*, 26 U. CHI. L. REV. 237 (1959).

¹⁷¹ This discussion of animating principles is not intended to be exhaustive; history may well yield other principles.

¹⁷² *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring). There appears to be a growing consensus among legal scholars that the core value of the religion clauses is religious liberty. See, e.g., Choper, *The Religion Clauses of the First Amendment: Rec-*

main purpose of the clauses is to effect strict separation between church and state, as if building Jefferson's wall is an end in itself.¹⁷³ The separation concept, however, is really a servant of an even greater goal; it is a means, along with concepts such as accommodation and neutrality, to achieve the ideal of religious liberty in a free society.

In the struggle for religious freedom, the central ideal from the colonial period of Williams and Penn to the Founders, was "liberty of conscience" in religious matters. Pietists, Enlightenment separationists, and political centrists uniformly understood this ideal, also referred to as religious liberty, to be an inalienable right encompassing both belief and practice.¹⁷⁴ The Founders differed over the content and means of achieving religious liberty, but they uniformly regarded it as an essen-

onciling the Conflict, 41 U. PITT. L. REV. 673, 678 (1980) (asserting that the "central aim of the Religion Clauses [is] protection of religious liberty"); Katz, *Radiations From Church Tax Exemption*, 1970 SUP. CT. REV. 93, 101 (arguing that the establishment clause requires only separation of church and state "compatible with full religious freedom"); McConnell, *supra* note 170, at 1 (stating that "religious liberty is the central value and animating purpose of the Religion Clauses"). For an early defense of this view, see Katz, *The Case for Religious Liberty*, in RELIGION IN AMERICA: ORIGINAL ESSAYS ON RELIGION IN A FREE SOCIETY 95, 115 (J. Cogley ed. 1958) ("The basic American principle of church-state relations is not separation but religious liberty.").

¹⁷³ Separationists sometimes equate strict separation of church and state or, more broadly, of religion and society, with religious freedom. Professor Pfeffer asserted, for example, that separation and freedom were synonymous: "[S]eparation guarantees freedom and freedom requires separation. The draftsmen of the [first] amendment regarded freedom of religion and establishment as incompatible. American constitutional history and tradition do not justify an apportionment of values between disestablishment and freedom." Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561, 564 (1980) (footnote omitted).

It does not necessarily follow, however, that a society that completely honors the disestablishment principle will be free. While it is true that an established church inhibits the full attainment of religious liberty, it is incorrect to equate disestablishment with liberty, or to infer that the absence of an establishment guarantees freedom. The most disestablished societies in the twentieth century are those governed by totalitarian regimes. On the other hand, countries such as England and Switzerland have nominal establishments, yet afford a degree of religious freedom that rivals that enjoyed in the United States. In short, although the absence of an establishment is an important step in fully realizing religious liberty, its absence does not itself create a society committed to liberty of conscience. Indeed, the highly regulatory welfare state without an establishment can pose as much, if not more, of a threat to religious liberty than historical establishments.

¹⁷⁴ "Liberty of conscience" and "religious liberty" are used interchangeably in this Article. An examination of the historical record from seventeenth-century England, when numerous pamphleteers campaigned for civil and religious freedom, to the early national period in America yields the conclusion that liberty of conscience was commonly, if not exclusively, understood in religious terms. See generally 3 W.K. JORDAN, *supra* note 17 (demonstrating that Puritan Presbyterians, Independents, and Sectarians used the term "liberty of conscience" in the context of religious toleration); TRACTS ON LIBERTY OF CONSCIENCE AND PERSECUTION: 1614-1661 (E. Underhill ed. 1846 & reprint 1966) (reprinting seventeenth-century tracts of English Baptists asserting liberty of conscience in religious matters).

tial cornerstone of a free society.

Liberty of conscience was invoked repeatedly by both Federalists and Antifederalists in the legislative history of the religion clauses; sometimes the term stood alone, at other times it was accompanied with an establishment prohibition and free exercise guarantee.¹⁷⁵ References to the concept also occurred in the state assemblies that gathered to consider ratification of the Bill of Rights. The Virginia Senate, for example, protested that the proposed third article, the present first amendment, did not "prohibit the rights of conscience from being violated or infringed."¹⁷⁶ The Northwest Ordinance of 1787 established a bill of rights for the Ohio country in order to extend "the fundamental principles of civil and religious liberty."¹⁷⁷ Between 1776 and 1792, every state that adopted a constitution sought to prevent the infringement of "liberty of conscience," "the dictates of conscience," "the rights

¹⁷⁵ See 1 ANNALS, *supra* note 89, at 434 (June 8, 1789) (Madison's proposed amendment referred to "full and equal rights of conscience" along with nonestablishment and free exercise guarantees); *id.* at 730 (Aug. 15, 1789) (Rep. Carroll maintained that "the rights of conscience" need special protection); *id.* (Rep. Madison indicated that the purpose of his proposal was to insure that Congress could not "infringe the rights of conscience, and establish a national religion"); *id.* at 730-31 (Rep. Huntington hoped that the amendment would "secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all"); *id.* at 731 (the House passed an amendment proposed by Rep. Livermore that prohibited Congress from "infringing the rights of conscience"); *id.* at 755 (Aug. 17, 1789) (the House adopted Madison's proposal prohibiting the states from infringing "the equal rights of conscience"); *id.* at 766 (Aug. 20, 1789) (the House passed Rep. Ames' proposal that referred to "rights of conscience" and contained establishment and free exercise clauses); 1 DE PAUW'S FIRST CONGRESS, *supra* note 94, at 151 (Senate Journal, Sept. 3, 1789) (reporting debates on several proposals prohibiting infringement of "the rights of conscience," from which the Senate struck the conscience clause, perhaps because it was redundant in view of explicit nonestablishment and free exercise guarantees).

¹⁷⁶ JOURNAL OF THE SENATE OF VIRGINIA FOR 1789, *quoted in* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 83, at 145.

¹⁷⁷ Northwest Ordinance § 13 (1787), *reprinted in* SOURCES, *supra* note 12, at 395; *see also supra* notes 49-52 and accompanying text (discussing religious liberty provisions in the Northwest Ordinance). The emphasis on civil and religious freedom is also evident in the Declaration of the Causes and Necessity of Taking Up Arms, promulgated by the Second Continental Congress in July 1775, three months after the battle of Lexington and Concord. Designed to obtain redress for grievances and restore harmony with Great Britain, the document condemned British colonial policy and referred to the Quebec Act as erecting "a despotism dangerous to our very existence." Declaration of the Causes and Necessity of Taking Up Arms (July 1775), *reprinted in* SOURCES, *supra* note 12, at 296. It approved armed resistance to preserve the liberties of America's forefathers, who "left their native land, to seek on these shores a residence for civil and religious freedom." *Id.* at 295. The document contained numerous references to God, and closed with a prayer for divine assistance: "With an humble confidence in the mercies of the supreme and impartial Judge and Ruler of the Universe, we most devoutly implore his divine goodness to protect us happily through this great conflict" *Id.* at 300.

of conscience," or the "free exercise of religion."¹⁷⁸

Madison regarded liberty of conscience as inalienable because it entailed a duty towards the Creator that was precedent to the claims of civil society.¹⁷⁹ "Conscience [was] the most sacred of all property," he asserted in 1792, because, unlike "other property depending in part on positive law, the exercise of [conscience was] a natural and unalienable right."¹⁸⁰ Later in life, he urged those states that retained in their constitutions "any aberration from the sacred principle of religious liberty, by giving to Caesar what belongs to God, or joining together what God has put asunder," to purify their systems "in what relates to the freedom of the mind and its allegiance to its maker, as in what belongs to the legitimate objects of political & civil institutions."¹⁸¹ In A Bill for Establishing Religious Freedom, Jefferson emphasized that "Almighty God hath created the mind free" and that governmental compulsion in religious matters was "a dangerous falacy, which at once destroys all religious liberty."¹⁸² His famous Danbury letter, the source of the controversial wall metaphor, indicated that the religion clauses expressed the "supreme will of the nation in behalf of the rights of conscience."¹⁸³

In his two extensive, sometimes seemingly impenetrable, treatises on church and state, Williams painstakingly disputed the prevailing justifications for governmental force in matters of conscience.¹⁸⁴ Such force violated God's command that "the most Paganish, Jewish, Turkish, or Antichristian consciences and worships, bee granted to all men in all Nations and Countries."¹⁸⁵ Nowhere does the centrality of reli-

¹⁷⁸ See *supra* notes 38-46 and accompanying text.

¹⁷⁹ See *supra* notes 59-62 and accompanying text.

¹⁸⁰ Essay in the National Gazette (Mar. 27, 1792), in 14 PAPERS OF MADISON, *supra* note 59, at 267.

¹⁸¹ Fleet, *supra* note 121, at 555 (quoting Madison's "Detatched Memoranda," n.d.).

¹⁸² Jefferson, A Bill for Establishing Religious Freedom (1785), in 2 PAPERS OF JEFFERSON, *supra* note 63, at 545-46.

¹⁸³ Reply to the Danbury Baptist Association (Jan. 1, 1802), in 8 WRITINGS OF JEFFERSON, *supra* note 107, at 113; see also *supra* note 110 and accompanying text (discussing the Danbury Baptist letter).

¹⁸⁴ Williams defended his first treatise, *The Bloody Tenent, of Persecution, for Cause of Conscience*, *supra* note 19, in an even longer work, R. WILLIAMS, *THE BLOODY TENENT YET MORE BLOODY* (London 1652), in 4 WRITINGS OF WILLIAMS, *supra* note 19. The latter work was a rejoinder to a book by John Cotton, who asserted the civil magistrate's right to suppress dissent and keep the established church pure. See J. COTTON, *THE BLOODY TENENT, WASHED, AND MADE WHITE IN THE BLOOD OF THE LAMBE* (London 1647).

¹⁸⁵ R. WILLIAMS, *THE BLOODY TENENT, OF PERSECUTION, FOR CAUSE OF CONSCIENCE*, *supra* note 19, at 3 (emphasis deleted). Rhode Island, of course, reflected Williams' views at an early date. In 1640, representatives of the town of Providence agreed "as formerly hath bin the liberties of the town, so still, to hould forth liberty of Conscience." Plantation Agreement at Providence (1640), in 6 THORPE, *supra* note 18,

gious liberty emerge more clearly among the pietists than in Penn's tract, *The Great Case of Liberty of Conscience*. The colonial leader understood well the consequences of living under a government insensitive to the religious needs of its citizens. During his early years as a Quaker activist, the English authorities jailed him on at least four occasions for doing nothing more than practicing his religion. Written from crowded Newgate prison in 1671, the tract espoused a broad understanding of liberty of conscience that became part of America's heritage:

First, by liberty of conscience, we understand not only a mere liberty of the mind, in believing or disbelieving . . . but the exercise of ourselves in a visible way of worship, upon our believing it to be indispensably required at our hands, that if we neglect it for fear or favor of any mortal man, we sin and incur Divine wrath . . .¹⁸⁶

If religious liberty is the core value of the religion clauses, then the Supreme Court's rigid dichotomy between nonestablishment and free exercise, without reference to this core value, is flawed historically.¹⁸⁷ The dichotomy generates unnecessary tension between the clauses¹⁸⁸

at 3206.

¹⁸⁶ W. PENN, *THE GREAT CASE OF LIBERTY OF CONSCIENCE*, *supra* note 23, at 447 (changed to conform to modern usage; emphasis deleted).

¹⁸⁷ In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court referred to a first amendment "concept of individual freedom of mind" or "individual freedom of conscience" when it invalidated an Alabama moment of silence statute under the establishment clause. *Id.* at 52-53. However, the *Wallace* Court did not clearly delineate the contours of this concept. See also *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (invoking a first amendment "right of freedom of thought" in holding that New Hampshire could not require display, over religious objections, of the state motto on license plates); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (invalidating a compulsory flag salute and pledge of allegiance ceremony for school children because it invaded "the sphere of intellect and spirit" protected by the first amendment).

¹⁸⁸ As Chief Justice Burger observed, "[t]he Court has struggled to find a neutral course between the two Religion Clauses, . . . either of which, if expanded to a logical extreme, would tend to clash with the other." *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970). The Court's struggle to find this "neutral course" has provoked a large body of commentary, most of which advocates the dominance of free exercise values. See W. MARNELL, *THE FIRST AMENDMENT* 225-29 (1964) (advocating a broad construction of the free exercise clause to protect religious minorities, but a narrow construction of the establishment clause to permit cultural expressions of majority religions); Choper, *supra* note 172, at 686 (the view that the free exercise clause is dominant "may be endorsed as wisely fulfilling the historic and contemporary aims of both clauses to further religious liberty"); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Religious Liberty Guarantee*, (pt. 1), 80 HARV. L. REV. 1381, 1389 (1967) (the free exercise clause should predominate, because it is "premised on a vital civil right," in contrast to the "outmoded eighteenth century political theory" on which the establishment clause rests); Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEX. L. REV. 142, 194-97 (1963) (establishment clause values such as "no-aid" and "separa-

and fosters inconsistent precedent in an area already fraught with confusion.¹⁸⁹ The tension between the clauses is illustrated by modern litigation, which often places them in opposition to one another. For example, attempts under the free exercise clause to secure exemptions from laws affecting religious practice are invariably opposed on establishment grounds.¹⁹⁰ In addition, given the development of distinct tests

tion" should yield to free exercise claims because the "establishment clause is largely designed to implement the free exercise clause"). *But cf. Pfeffer, The Case for Separation*, in *RELIGION IN AMERICA: ORIGINAL ESSAYS ON RELIGION IN A FREE SOCIETY* 52, 60 (J. Cogley ed. 1958) (arguing that the two clauses "are not separate concepts or principles," but are of equal dignity and were intended to promote the "unitary freedom-separation principle").

¹⁸⁹ The Court's failure to articulate enduring principles reconciling the tension between the clauses is most evident in cases involving aid to religiously-affiliated schools. *Wolman v. Walter*, 433 U.S. 229 (1977), which considered an Ohio statute providing comprehensive aid to parochial schools, illustrates dramatically the Court's inability to reach any kind of consensus. Eight opinions were filed in the case, as the Justices engaged in fragmented voting patterns over six forms of aid. With unusual candor, Justice Powell conceded in his separate opinion that "[o]ur decisions in this troubling area draw lines that often must seem arbitrary." *Id.* at 262 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Although scholars disagree sharply over the school aid issue, they uniformly concur with Justice Powell's assessment. *See, e.g., Howard, Up Against the Wall: The Uneasy Separation of Church and State*, in *CHURCH, STATE AND POLITICS* 5, 21 (J. Hensel ed. 1981) (reading the school aid decisions is like "stumb[ing] into the forest of Hansel and Gretel, the birds having eaten all the crumbs that mark the way out"); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 *VILL. L. REV.* 3, 18 (1978) (the Supreme Court's school aid decisions reveal that even "within this narrow but important area there is again no sign of consistency"); Marty, *Of Darters and Schools and Clergymen: The Religion Clauses Worse Confounded*, 1978 *SUP. CT. REV.* 171, 190 (noting that the school aid decisions fail to disclose "any [consistent] principle except fear of entanglement—which is not a principle at all"). For an admirable attempt to reconcile the Court's establishment clause decisions on the basis of a symbolic endorsement approach, see Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 *S. CAL. L. REV.* 495 (1986).

¹⁹⁰ In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that the free exercise clause compelled South Carolina to grant unemployment benefits to a Seventh-day Adventist unable to find employment because she refused to work on her Sabbath. It concluded that affording such benefits "plainly" did not establish the Seventh-day Adventist religion, but that the benefits in fact promoted governmental neutrality between Sabbatharians and Sunday worshippers. *See id.* at 409. Subsequent free exercise cases involving unemployment compensation have summarily rejected the establishment clause contention. *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987) (dismissing an establishment clause argument on the basis of *Sherbert*); *Thomas v. Review Bd.*, 450 U.S. 707, 719-20 (1981) (noting that payment of benefits to Jehovah's Witnesses does not violate the establishment clause, but merely reflects "the tension between the two Religious Clauses which the Court resolved in *Sherbert*").

Dean Choper argues, however, that it is not at all plain that the benefits compelled in *Sherbert* were consistent with the establishment clause. He asserts that *Sherbert* was "doubly wrong": "Not only was South Carolina's denial of unemployment compensation to Sherbert not a violation of the free exercise clause, it was a violation of the establishment clause for the Court to require the State to grant it to her." Choper,

for each clause, the Court has compounded doctrinal confusion by failing to articulate workable principles for determining whether a case falls under the establishment or free exercise clause.¹⁹¹

In criticizing the Court's strict dichotomy between establishment and free exercise jurisprudence, it is not suggested that the clauses are coextensive and lack independent vitality. The Framers made an explicit textual distinction between the two, and history supports the view that the nonestablishment and free exercise guarantees play different, although mutually supportive, roles in protecting religious liberty. These roles will become more apparent in the discussion of four historical principles animating the religion clauses: federalism, institutional separation, accommodation, and benevolent neutrality.

B. *The Principle of Federalism*

To the Puritans, the prosperity of society rested on the proposition "that our churches, and civil state have been planted, and grown up (like two twins) together."¹⁹² In his debates with Williams, the Puritan divine John Cotton stressed the importance of the established church in maintaining civil order, asking at one point: "And can the Church then break up, into pieces, and dissolve into nothing, and yet the peace and welfare of the city, not in the least measure [be] impaired or disturbed?"¹⁹³ This question poses one of the principal challenges faced

The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments, 27 WM. & MARY L. REV. 943, 949-50 (1986).

¹⁹¹ As Professor Phillip Johnson notes in an insightful article, the outcome of a religious liberty case may depend largely on whether the Court characterizes it as falling under the establishment clause, free exercise clause or, as in a growing number of cases, the free speech clause. See Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 820-21 (1984). The Court has failed, however, to develop "neutral principles" to govern this determination. Consequently, characterization may depend on analogizing cases to precedent or, more disturbingly, on what result the justices desire to reach. See *id.* at 821-25.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, a student religious group challenged a University of Missouri regulation prohibiting the use of school buildings or grounds for religious meetings. The district court not only sustained the regulation, but held that it was compelled by the establishment clause. The court of appeals reversed because the exclusionary policy violated the free speech clauses' ban against content-based discrimination. The Supreme Court affirmed, agreeing that the case fell under the free speech clause rather than the establishment clause. See *id.* at 269.

¹⁹² THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS at A2 (Cambridge, Mass. 1648) (changed to conform to modern usage; emphasis deleted); see also *supra* notes 11-14 and accompanying text (discussing the Puritans).

¹⁹³ J. COTTON, THE BLOODY TENENT, WASHED, AND MADE WHITE IN THE BLOOD OF THE LAMBE 12 (London 1647) (changed to conform to modern usage; emphasis deleted).

by the Founders: to create a republic free of an established church and committed to religious liberty, yet open to religion as a necessary and cohesive moral force in society. They were well aware of the bigotry, intolerance, and persecution characteristic of Old World and colonial establishments, but they generally agreed with Washington: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens."¹⁹⁴ How then did the Founders go about creating a republic premised on civil and religious liberty?

Deeply influenced by political theorists such as Locke and Montesquieu, the Founders believed that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."¹⁹⁵ To prevent the centralization of political authority at the national level, they created a tripartite federal government that exercised only enumerated powers. Under the tenth amendment, any powers not delegated to the federal government by the Constitution, "nor prohibited by it to the States, [were] reserved to the States respectively, or to the people."¹⁹⁶ The Bill of Rights, added largely at the insistence of the public and the state ratifying conventions, explicitly circumscribed the power of Congress in religious matters.

Legislative history¹⁹⁷ suggests that a variety of convictions inspired the religion clauses, including a belief that religious exercise was a fragile and inalienable right needing special protection,¹⁹⁸ that authority over religion, to the extent it could be exercised, was a state mat-

¹⁹⁴ Farewell Address by George Washington (Sept. 17, 1796), in 1 J. RICHARDSON, *supra* note 118, at 220; *see also* A. REICHLEY, *supra* note 170, at 340 ("Almost all of the principal founders of the United States, including Thomas Jefferson, were convinced that the health of republican government depends on moral values derived from religion.").

¹⁹⁵ THE FEDERALIST NO. 47, at 336 (J. Madison) (B. Wright ed. 1961).

¹⁹⁶ U.S. CONST. amend. X. As Professor Tribe indicates, the Constitution called for the division of governmental authority along two lines: "vertically (along the axis of federal, state and local authority) and horizontally (along the axis of legislative, executive, and judicial authority)." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-2, at 2 (1978).

¹⁹⁷ *See supra* notes 88-97 and accompanying text.

¹⁹⁸ In the House debates held on August 15, 1789, Daniel Carroll favored an amendment guaranteeing religious liberty because "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and [because] many sects have concurred in opinion that they are not well secured under the present Constitution." 1 ANNALS, *supra* note 89, at 730 (Aug. 15, 1789).

ter;¹⁹⁹ and that, unless prevented, Congress would pose a dangerous threat to religious liberty or would interfere with existing state establishments.²⁰⁰ Underlying these convictions was a principle of federalism premised on the political philosophy of the Framers and their fear of centralized authority. The preservation of religious liberty depended in part on this principle, which marked the boundaries between federal and state authority. History suggests at least three reasons why the religious clauses were directed only against Congress.

First, while Madison and others recognized that existing state establishments threatened religious liberty,²⁰¹ the Framers appeared united in the belief that a national church, patterned after the English model, posed the greatest threat to this liberty.²⁰² An alliance of church and state at the national level would result in "accumulation" of religious and civil power in "the same hands," the very essence of tyranny. This accounts for the "deeply rooted" fear of an American episcopacy, as Professor Edwin Gaustad points out: "Throughout much of the

¹⁹⁹ This sentiment was expressed by Rep. Thomas Tucker of South Carolina in the House debates over Madison's proposed amendment prohibiting the states from infringing the "equal rights of conscience." Tucker opposed the measure: "[This amendment] goes only to the alteration of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much." *Id.* at 755 (Aug. 17, 1789).

²⁰⁰ See *infra* notes 202-05 and accompanying text; *infra* notes 211-15 and accompanying text.

²⁰¹ Madison's recognition of this threat may explain his proposed amendment that "[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." 1 ANNALS, *supra* note 89, at 435 (June 8, 1789). In the House debates on August 17, Madison maintained that this was "the most valuable" of the amendments: "If there were 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.* at 755 (Aug. 17, 1789).

²⁰² Thus, Madison's proposed amendment of June 8, 1789 read, "nor shall any national religion be established," 1 ANNALS, *supra* note 89, at 434-35 (June 8, 1789), and the Senate's version adopted on September 9 provided that "Congress shall make no law establishing articles of faith or a mode of worship," 1 DE PAUW'S FIRST CONGRESS, *supra* note 94, at 166 (Sept. 9, 1789). On August 15, 1789, the House debated the proposal that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 ANNALS, *supra* note 89, at 729 (Aug. 15, 1789). Madison "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* at 730. When Rep. Huntington objected that the proposal might prove "extremely hurtful to the cause of religion," *id.*, Madison responded by recommending the insertion of "national" before religion:

[Madison] believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word "national" was introduced, it would point the amendment directly to the object it was intended to prevent.

Id. at 731.

eighteenth century, colonists were haunted by a fear of *episcopacy*—i.e., a fear that Anglican bishops would sail to America, there to exercise spiritual *and* temporal powers—powers made the more fearful because no proper distinction between them was made.”²⁰³ The colonists expressed similar fears over the Quebec Act, a British law enacted in May 1774 that recognized Roman Catholicism in Quebec and extended the province’s boundaries as far south as the Ohio Valley. Alexander Hamilton alleged that the measure established the “Church of Rome” in Canada,²⁰⁴ and the Declaration and Resolves of the First Continental Congress, adopted in October 1774, denounced as one of Parliament’s “Intolerable Acts” the statute “establishing the Roman Catholic religion, in the province of Quebec . . . to the great danger” of the colonies.²⁰⁵

Second, as a corollary to their fear of a national establishment, the Founders generally believed that civil authority in religious matters, to the extent it could be exercised, was a state function. According to Jefferson, the “power to prescribe any religious exercise, or to assume authority in religious discipline,” rested not with the General Government, but with the states, “as far as it [could] be in any human authority.”²⁰⁶ Under the constitutional plan of limited and enumerated congressional powers, the states exercised the general health and welfare authority, retaining control over most governmental matters affecting citizens. This division of political authority derived in part from a view that the national and state governments would “check” each other

²⁰³ Gaustad, *A Disestablished Society: Origins of the First Amendment*, 11 J. CHURCH & ST. 409, 414 (1969). This helpful article advances four sources that contributed to the movement for disestablishment in the late colonial and early republican periods: “the principles of radical religion; the pragmatism of conservative religion; the position of natural religion; and the indifference to and hostility toward religion.” *Id.* at 409.

²⁰⁴ See Hamilton, *Remarks on the “Quebec Bill”* (1775), reprinted in part in 1 A. STOKES, *supra* note 17, at 510-11. In this document, Hamilton defined establishment in terms of governmental protection and support for a religion. He emphasized that with an established religion “[c]ertain precise dues, (tithes &c.) are legally annexed to the clerical office, independent of the liberal contributions of the people.” *Id.* at 510.

²⁰⁵ Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), reprinted in SOURCES, *supra* note 12, at 289.

²⁰⁶ Letter from Thomas Jefferson to the Rev. Millar (Jan. 23, 1808), in 5 WRITINGS OF JEFFERSON, *supra* note 107, at 237. In explaining why he did not follow precedent and proclaim national days of fasting and prayer, Jefferson asserted: “I have ever believed, that the example of State executives led to the assumption of that authority by the General Government, without due examination, which would have discovered that what might be a right in a State government, was a violation of that right when assumed by another.” *Id.* See also *supra* note 112 and accompanying text (noting Jefferson’s refusal to issue religious proclamations while President).

from usurping the liberties of the people,²⁰⁷ and in part from the notion that the states would act as a shield between federal power and individual liberty. Hamilton, the chief proponent of a strong national government, conveyed the latter notion in *The Federalist Papers*: "It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority."²⁰⁸

The religion clauses, at least originally, embodied the jurisdictional concern of federalism; civil authority in religious affairs resided with the states, not the national government. The Constitution nowhere granted Congress explicit authority in such matters. Many Framers, primarily the Federalists, therefore thought that an express limitation on congressional power over religion was unnecessary, and perhaps dangerous, because it would suggest that Congress possessed such authority in the first place.²⁰⁹ While Federalists and Antifederalists debated the need for a bill of rights, they appeared to agree that redress for religious grievances should be left primarily, if not exclusively, at the state level,²¹⁰ to give Congress authority over such matters would intrude on the states and create a centralized threat to religious free-

²⁰⁷ THE FEDERALIST NO. 28, at 225 (A. Hamilton) (B. Wright ed. 1961).

²⁰⁸ *Id.*

²⁰⁹ When Madison introduced his series of proposed amendments on June 8, 1789, he conceded that this was "one of the most plausible arguments" against a federal bill of rights:

[B]y enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.

1 ANNALS, *supra* note 89, at 439 (June 8, 1789). See also *id.* at 442 (Rep. Jackson expressed opposition to "a declaration of rights in the Constitution" because "unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government"). On August 15, 1789, Roger Sherman asserted that an amendment guaranteeing religious freedom was "altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments." *Id.* at 730 (Aug. 15, 1789).

²¹⁰ This outlook is illustrated by the Constitutional Convention's handling of Jonas Phillips' petition objecting to Pennsylvania's 1776 test oath for legislators. The petition received committee reference, but ultimately the issue was resolved at the state level. See *supra* notes 79-81 and accompanying text. An earlier incident that perhaps illustrates this point occurred in October 1774, when Isaac Backus led a delegation of Baptists to address the First Continental Congress on the inequities of the religious taxation system in Massachusetts. The group met with the congressional delegates from Massachusetts, among them John and Samuel Adams, who defended the colony's "mild and equitable" establishment and laid the blame for the grievance on the Massachusetts General Court. The Baptists then sought redress from the colony's legislature, but nothing came of their efforts. For a detailed account of this episode, see 1 W. MCLOUGHLIN, NEW ENGLAND DISSENT, *supra* note 18, at 556-68.

dom. Such an approach was not unenlightened, for a majority of the states had disestablished their preferred churches and, in those states retaining establishments, forces were at work that steadily increased the freedom of dissenters.

Third, the recognition that civil authority in religious affairs was a state rather than a federal concern accounts for the view that some Framers intended the establishment clause to prevent congressional interference with existing state establishments.²¹¹ Congress arguably could have interfered either by establishing a national church to displace state-preferred churches or by enacting laws that favored or burdened all or some state religious establishments.²¹² The Framers' concern with noninterference may explain the use of the word "respecting" in the establishment clause: a first amendment that read "nor shall any national religion be established"²¹³ would still permit Congress to attempt, perhaps under the "necessary and proper" clause,²¹⁴ to meddle with state establishments. By prohibiting Congress from making any law "respecting" an establishment of religion, the proposed amendment would satisfy both concerns and gain the support of those Founders seeking to protect established state churches.²¹⁵

In addition to dividing state and federal authority, the Founders sought to ensure a free society by affording constitutional protection, at both levels, to "mediating" institutions such as the family, churches, the press, business, and voluntary associations. These institutions not only served as buffers between the individual and the government, but often represented different interests in the public arena. While liberty inevitably produces conflicting factions that can threaten civil unity,

²¹¹ In his analysis of the House debates held on August 15, 1789, Thomas Curry argues convincingly that Benjamin Huntington's remarks reveal a fear that "the [proposed religious freedom] amendment might give Congress power to interfere with existing arrangements in the individual states." T. CURRY, *supra* note 15, at 203.

²¹² Some of the Framers feared that Congress would interfere in religious matters under its power to "make all Laws which shall be necessary and proper" to carry out its enumerated powers. U.S. CONST. art. I, § 8, cl. 18; *see also* 1 ANNALS, *supra* note 89, at 438 (June 8, 1789) (reporting Madison's concern over the broad scope of the General Government's discretionary powers, particularly its potentially unlimited authority under the "necessary and proper" clause).

²¹³ Madison proposed that the amendment be drafted in this language. *See* 1 ANNALS, *supra* note 89, at 434 (June 8, 1789).

²¹⁴ *See supra* note 212.

²¹⁵ This explanation does not preclude the use of the word "respecting" as a means of satisfying those Founders who sought to secure religious liberty by limiting congressional power. The two explanations are not mutually exclusive. The final choice of wording may have resulted from a coalition of Founders influenced by different motivations—one faction stressing the danger to religious liberty posed by an alliance between ecclesiastical and civil authority at the national level, and another faction desiring to limit Congress in order to preserve existing state establishments.

Madison argued in *Federalist No. 10* that the method of "curing the mischiefs of faction" was not to remove its causes,²¹⁶ but to control its effects through a properly structured and extended republican government: "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."²¹⁷ Madison reiterated this theme in *Federalist No. 51*: "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."²¹⁸

Before evaluating the current relevance of the federalism principle, it is appropriate to discuss briefly the Court's use of the fourteenth amendment due process clause to apply the religion clauses to the states.²¹⁹ The holding in *Cantwell v. Connecticut*²²⁰ that the liberty guaranteed by the fourteenth amendment embraced the free exercise clause sparked little controversy, for the right to exercise one's religion seemed a natural component of any proper conception of liberty. The decision in *Everson* that the due process clause encompassed the nonestablishment guarantee proved more controversial.²²¹

In his dissent in *Abington School District v. Schempp*,²²² Justice Stewart accepted the incorporation of the establishment clause, but noted that "it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now

²¹⁶ Madison noted that there were "two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests." THE FEDERALIST NO. 10, at 130 (J. Madison) (B. Wright ed. 1961). He rejected the first as "worse than the disease" and the second as "impracticable." *Id.*

²¹⁷ *Id.* at 136.

²¹⁸ THE FEDERALIST NO. 51, at 358 (J. Madison) (B. Wright ed. 1961).

²¹⁹ The federal judiciary rendered relatively few decisions under the religion clauses in the first 150 years of the nation's existence. Prior to the incorporation of the religion clauses into the fourteenth amendment, the Supreme Court and lower federal courts had the power to review alleged establishment or free exercise violations by Congress under article III, which states that the "judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution." U.S. CONST. art. III, § 2, cl. 1. No authority existed, however, for federal courts to review religious liberty claims arising under state law. The paucity of federal cases interpreting the religion clauses between the late eighteenth and early twentieth centuries is thus attributable to at least two factors: the small number of religion-based claims initiated against the national government and the limitations on federal review of state actions involving religion.

²²⁰ 310 U.S. 296, 303 (1940).

²²¹ See *Everson*, 330 U.S. at 8; see also *supra* note 161 and accompanying text (discussing criticisms of the *Everson* Court's incorporation of the establishment clause).

²²² 374 U.S. 203 (1963).

have become a restriction upon their autonomy."²²³ Since *Everson* in 1947, the issue has continued to spark heated scholarly debate.²²⁴ Whatever the conceptual and historical difficulties with the incorporation of the establishment clause, it must be recognized that the Court now considers the matter closed, as one federal judge recently learned.²²⁵ While scholars undoubtedly will persist in debating the matter, lawyers and judges must continue to confront the question "when is the right to be free from establishment violated?"²²⁶

The starting point in addressing this question is the recognition that the fourteenth amendment absorbs "the Establishment Clause as a co-guarantor, with the Free Exercise Clause, of religious liberty."²²⁷ To the extent the establishment clause is understood to perform this role, rather than the mistaken function of effecting strict separation between church and state, the conceptual and historical difficulties with incorporation are minimized. Interpreted in the light of history, the establishment clause should prohibit only those governmental actions threatening religious liberty in a manner analogous to traditional establishments.

Incorporation inaugurated a new era of federal judicial supremacy and reshaped the legal landscape for religious liberty issues. Given this fact, what can be learned from the Founders' political philosophy and the principle of federalism? The Founders would likely be surprised and perhaps even alarmed by the size and power of today's government. Such concentration of authority, particularly at the federal level, inevitably poses a threat to religious liberty. This threat is particularly acute in areas such as church labor relations and the administration of

²²³ *Id.* at 310 (Stewart, J., dissenting).

²²⁴ For extensive discussions of the incorporation debate, see R. CORD, *SEPARATION*, *supra* note 88, at 84-101; L. LEVY, *ESTABLISHMENT*, *supra* note 88, at 165-85; R. SMITH, *supra* note 88, at 133-70.

²²⁵ In *Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104, 1124 (S.D. Ala. 1983), Chief Judge Hand refused to enjoin teacher-initiated prayer activity in Alabama's public schools because he concluded that the historical record showed that the fourteenth amendment did not incorporate the establishment clause. The court of appeals promptly reversed in a strident opinion, *Jaffree v. Wallace*, 705 F.2d 1526, 1532 (11th Cir. 1984) (holding that the Supreme Court had conclusively resolved the incorporation issue and that "its interpretations may not be disregarded"), *aff'd*, 472 U.S. 38 (1985) (confirming incorporation of the establishment clause after extended discussion).

²²⁶ Kauper, *supra* note 160, at 316. Professor Kauper pointedly asks what fundamental liberty interest is embodied in the establishment clause: "Is it simply a right to be free from establishment, or is it a right not to be deprived of life, liberty or property by a law respecting establishment of religion?" *Id.*

²²⁷ *Schempp*, 374 U.S. at 256 (Brennan, J., concurring). This concurring opinion contains the most extensive defense by a Justice of the incorporation of the establishment clause. See *id.* at 254-58.

the federal tax exemption for religious organizations.²²⁸ In the latter area, governmental agencies and courts face exceedingly delicate tasks: ensuring that entities are "organized and operated exclusively" for religious purposes; defining "church," "religious purposes," and related terms; determining whether a religious group is substantially engaged in political action; gauging whether net earnings inure illegally to private individuals; and determining whether a particular group meets public policy criteria.²²⁹

Accompanying the expansive growth of the regulatory state is a prevailing paternalistic belief that government must meet all the primary needs of its citizens, and a mistaken notion derived from strict separation that virtually all the avenues for discourse and resolution are in a public arena shut off to religion by virtue of the establishment clause. Thus, functions formerly regarded as familial or religious, such as child-care, social services, and education, are now carried out by government and viewed by many as secular. Those holding such beliefs might be surprised to learn that John Stuart Mill, the most prominent spokesman for liberalism in the nineteenth century, regarded state control of education as a principal threat to liberty.²³⁰ The monopolistic trend of government has resulted in a subtle but steady "privatization" of religion, based on the belief that religious conviction and influence are not only unwelcome in the public arena, but are in fact constitu-

²²⁸ For a discussion of the threat to religious liberty posed by church labor relations, see Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1382-84 (1981) (describing three ways in which government involvement inhibits religion); cf. Adams & Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980) (focusing on judicial intervention in church property disputes, but articulating principles applicable to the area of church labor relations).

Excellent overviews of the federal tax provisions affecting religious organizations are contained in Schwarz, *Limiting Religious Tax Exemptions: When Should the Church Render Unto Caesar?*, 29 U. FLA. L. REV. 50 (1976) and Slye, *Rendering Unto Caesar: Defining "Religion" for Purposes of Administering Religion-Based Tax Exemptions*, 6 HARV. J.L. & PUB. POL'Y 219 (1983).

²²⁹ See Slye, *supra* note 228, at 242-78 (discussing the federal tax exemption for religious organizations and the substantive tests used by the Internal Revenue Service to determine eligibility).

²³⁰ Mill stated:

A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation; in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.

J.S. MILL, ON LIBERTY 98 (London 1859) (D. Spitz ed. 1975).

tionally excluded from it. Thus, one scholar has made the rather startling and ahistorical suggestion that the establishment clause precludes public officials from even thinking in religious terms when discharging governmental duties.²³¹

Given the pervasiveness of government in our lives and the increasing privatization of religion, the Founders' political philosophy and the concepts underlying federalism take on added significance. First, the federal judiciary should pause in contemplating the enormous task it inherited, somewhat suddenly, as a result of the incorporation of the establishment clause. This action nationalized issues of church and state that had been resolved by democratic processes or under state constitutional provisions and laws for over one and one-half centuries. It placed in the hands of the federal judiciary expansive power in formulating the role of religion in society. In view of the religious foundations of American culture, judges should approach this task with diffidence and avoid the temptation to impose their personal preferences. Without the guidance of history and tradition, judicial decision making in this sensitive field is fundamentally anti-democratic. In discussing the limits of judicial review, Learned Hand stressed that judges should not act as social engineers or "Platonic Guardians": "it certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve."²³² By failing to heed this advice, the Supreme Court has undertaken a long and hard journey into the area of church and state, one that often has aroused the passions and disdain of the people. Guided by personal predilections or distorted history, judicial construction of the religion clauses too often constitutes a "tyranny of the few."²³³

²³¹ See Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075, 1076 (1986) ("Perhaps implicit in the notion of a liberal democracy and in the establishment clause of the first amendment are positional obligations of officials that preclude them from relying on the very religious grounds on which they would be entitled to rely were they merely citizens deciding what political positions to hold."). The authors can only recommend that Professor Schauer read Washington's Farewell Address, regarded by both Madison and Jefferson as one of the "best guides" to understanding the American system of government. See *supra* note 36 and accompanying text.

²³² L. HAND, *THE BILL OF RIGHTS* 73 (1958).

²³³ That personal predilections or distorted history can lead to decisions with enormous and tragic social consequences is illustrated by *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, the Court in a 5-4 decision invalidated a New York program under which public school employees conducted remedial reading, mathematics, and guidance programs in parochial schools. The services, which were limited to educationally deprived children from low-income families, were also provided to children in public and nonreligious private schools. See *id.* at 404-06 & n.1. Despite the program's noted success and the absence of even one instance of religious indoctrination in its

Second, the principle of federalism compels recognition that mediating structures, "those institutions standing between the individual in his private life and the large institutions of public life,"²³⁴ are essential to the preservation of civil and religious freedoms. Prompted by their fear of centralized authority, the Founders created a constitutional system under which state and local governments, as well as other social institutions, stood between the citizen and the national government. Institutions such as the family, voluntary associations, the press, universities, and particularly churches, are essential sources for the values necessary to sustain a free society. Because they are more accessible and responsive to the needs of people than large governmental and corporate bureaucracies, these mediating structures empower citizens to speak meaningfully and effectively and to challenge questionable government activities. The advent of a regulatory state of Leviathan proportions and the nationalization of constitutional issues through incorporation has led mediating structures to play a critical role in at least two respects: on a personal level, they provide meaning in an increasingly alienating culture and, in the public realm, they facilitate the independent articulation of alternative perspectives. The latter function may be traced to the political philosophy of the Founders, who believed that liberty is most easily secured in a society characterized by the in-

nineteen-year history, the Court invoked its strict separationist rhetoric in concluding that the remedial program *might* lead to excessive entanglement between church and state. *See id.* at 409, 414.

Leading constitutional scholars have almost uniformly denounced the excessive entanglement test, characterizing it as a vague tool designed to justify subjective judicial decision making, *see* Kauper, *Public Aid for Parochial Schools and Church Colleges: The Lemon, DiCenso and Tilton Cases*, 13 ARIZ. L. REV. 567, 584-87 (1971) (describing the flexible manner in which the Court can apply the test); Kurland, *supra* note 189, at 20 ("The Court is left to decide how much separation is required or how much entanglement is too much entanglement."); as an unwelcome return to the rigidity of strict separation, *see* Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1201 (1980) ("The introduction of 'excessive entanglement' into traditional establishment clause analysis . . . clearly heightened, at least conceptually, the proverbial 'wall of separation.'"); as the death knell for using neutral principles to interpret the establishment clause, *see id.* at 1217; and as a potential threat to historic free exercise values, *see id.* at 1230 (warning of the potential for infringements on first amendment rights); *see also* Kurland, *supra* note 189, at 26 ("The question remains whether in the absence of clear constitutional mandate, the Court should have spoken at all in many of these cases.").

²³⁴ P. BERGER & R. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 2 (1977) (emphasis deleted). Berger and Neuhaus emphasize that "[mediating] institutions have a private face, giving private life a measure of stability, and they have a public face, transferring meaning and value to the megastructures." *Id.* at 3. *See also* CHURCH, STATE, AND PUBLIC POLICY: THE NEW SHAPE OF THE CHURCH-STATE DEBATE (J. Mechling ed. 1978) (containing essays and dialogue based on a conference organized by the Mediating Structures Project and co-directed by Berger and Neuhaus).

teraction of competing interests, and who sought to prevent tyranny by pragmatically dispersing power. While moral authority must be exercised prudently, religious organizations historically have performed a unique and vital function as mediating structures by appealing to transcendent values.

C. *The Principle of Institutional Separation*

Any use of the word "separation" in the context of church and state must be guarded. The term has become talismanic to the public and media and provokes confusion, particularly when associated with words such as "complete," "strict," and "wall."²³⁵ The poet Robert Frost may have defined the problem: "Before I built a wall I'd ask to know / What I was walling in or walling out"²³⁶ While the separation principle is a means of achieving liberty of conscience in religious matters, the principle must be understood in the context of the American heritage of religious liberty. Two misconceptions have obscured the meaning of separation: that the principle requires a secular society, and that it demands the exclusion of religion from politics.

First, the Founders conceived of separation in institutional rather than cultural terms. The principal evil they sought to avoid was an alliance of civil and ecclesiastical power that would threaten religious liberty; that religion and society should be separated was a notion that would have met with uniform disapproval. The centrist position that predominated among the Founders recognized that religion was a great teacher of morality and an essential pillar of civil society. This view was expressed in article III of the Northwest Ordinance and in Washington's Farewell Address.²³⁷

History also provides numerous instances in which early American governments sanctioned religious involvement. The same Congress that framed the religion clauses requested President Washington to proclaim "a day of public thanksgiving and prayer"²³⁸ and approved military

²³⁵ For a more detailed discussion of the history of the term "wall of separation," see *supra* notes 21 & 110-11 and accompanying text.

²³⁶ R. FROST, *Mending Wall* (1914), in *THE POETRY OF ROBERT FROST* 33, 34 (E. Lathem ed. 1969).

²³⁷ See *supra* note 52 and accompanying text (quoting article III of the Northwest Ordinance); *supra* notes 128 & 194 and accompanying text (quoting Washington's Farewell Address). While the Enlightenment influenced many of the Founders, those in the political centrist camp were particularly alarmed by the excesses and anticlericalism wrought by the rationalism of the French Revolution. See H. MAY, *supra* note 104, at 252-57.

²³⁸ 1 ANNALS, *supra* note 89, at 914 (Sept. 25, 1789); see also *supra* note 95 and accompanying text (quoting Congress' request).

and legislative chaplains.²³⁹ Presidents Washington, Adams, and Madison issued proclamations recommending days of thanksgiving, humiliation, and prayer that repeatedly invoked the Deity.²⁴⁰ Presidents Washington, Jefferson, Monroe, John Quincy Adams, Jackson, and Van Buren entered into treaties with various Indian tribes authorizing the use of federal funds for religious purposes.²⁴¹ In short, the Founders affirmed the importance of religion to the new republic and would have rejected the use of the establishment clause to eradicate the religious leaven from public life.²⁴² Instead, while recognizing the historical dangers posed by religious establishments, they would agree that government may acknowledge the crucial importance of religion to many citizens. The Founders undoubtedly would have concurred with Justice Douglas' observation in *Zorach v. Clauson*: "We are a religious people whose institutions presuppose a Supreme Being."²⁴³

Second, separation of church and state does not mean separation of

²³⁹ See R. CORD, SEPARATION, *supra* note 88, at 53-55.

²⁴⁰ See *supra* notes 127-28 and accompanying text (noting Washington's invocation of the Deity and proclamation of a day of national thanksgiving); *supra* note 131 and accompanying text (noting Adams' proclamation of national fast days); *supra* note 119 and accompanying text (noting Madison's declaration of days of thanksgiving, public humiliation, and prayer).

²⁴¹ See R. CORD, SEPARATION, *supra* note 88, at 57-61.

²⁴² As Professor Harold Berman indicates, the Framers "almost certainly would have agreed . . . that law, the Constitution itself, could not survive the disappearance of religious faith in this country." H. BERMAN, THE INTERACTION OF LAW AND RELIGION 140 (1974). See also C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 83, at 159-88 (discussing practices of the people of the constitutional generation, including grants of public land and funds to religious institutions; tax exemptions for churches and religious schools; legal incorporation of churches; legislative and military chaplains; days of thanksgiving; and blasphemy and Sunday closing laws).

²⁴³ 343 U.S. 306, 313 (1952). The Supreme Court has repeatedly quoted this statement, and lower courts and commentators have frequently employed it in addressing religious liberty issues. Indeed, the maxim has acquired a prominence overshadowed only by the wall of separation metaphor. The Court's continued use of both the maxim and the wall metaphor will only serve to reinforce the irreconcilable tension in its decisions under the religion clauses. The precise meaning of the maxim is open to question, but it perhaps embodies the notions that religion, particularly the Judeo-Christian ethic, has played an important role in shaping American institutions, and that these institutions depend for continued strength on recognition of a Supreme Being and on religiously-based moral values.

For support for the maxim, see *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting) (discussing "the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government"); *McCullum v. Board of Educ.*, 333 U.S. 203, 239 (1948) (Reed, J., dissenting) ("directing attention to the many instances of close association of church and state" in American history and culture); C. RICE, THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT 53-68 (1964) (citing the practices of American institutions, the inaugural addresses of Presidents, state constitutions, and legislative and judicial pronouncements as evidence that "the existence and supremacy of God have been repeatedly recognized in [the United States]").

religion and politics. In this respect, it is a mistake, both as a matter of history and constitutional principle, to assert that the religion clauses command "mutual abstention—keeping politics out of religion and religion out of politics."²⁴⁴ From politically active ministers such as Samuel Davies and John Witherspoon during the Revolution to Reinhold Niebuhr and Martin Luther King, Jr. in modern times, American history is replete with examples of religious leaders entering the political arena and influencing social policy.²⁴⁵ The participation of religious groups in public issues such as the abolition of slavery, school prayer, civil rights, the reduction of nuclear arms, and abortion is evidence of a free society.²⁴⁶ The nation's religious groups come largely from traditions that reject the Enlightenment dogma that they are subservient to government. Instead, they view both church and state as God-ordained institutions entrusted with the public welfare.²⁴⁷ To assert the absolute supremacy of the state over religious institutions and over the individual conscience is to take a step toward totalitarianism. In a century that has witnessed brutal savagery, churches understandably realize the important prophetic role they must play. Referring to Pastor Dietrich Bonhoeffer, who was killed by the Nazis in April 1945, American theo-

²⁴⁴ Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686 (1969). The Court cited this article in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), when it announced, without citing any historical evidence, that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.* at 622. This political divisiveness concept, a corollary of the excessive entanglement test, has been criticized as "dysfunctional, illiberal, theologically unsound, constitutionally impermissible, and historically erroneous." Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 236 (1980); see also Choper, *supra* note 172, at 683-84 (arguing that history and judicial doctrine demonstrate that political divisiveness neither should nor can represent an enduring constitutional value). Perhaps realizing the concept's troubling implications, the Court largely interred it in *Mueller v. Allen*, 463 U.S. 388 (1983), by restricting its use to cases involving direct financial aid to parochial schools. See *id.* at 403-04 & n.11.

²⁴⁵ See Bernardin, Marty & Adams, *The Role of the Religious Leader in the Development of Public Policy*, 34 DE PAUL L. REV. 1 (1984). Even Jefferson conceded Madison's argument that the establishment clause did not foreclose ministers from becoming legislators. For a discussion of their views and early state constitutional provisions prohibiting clergy from holding public office, see McDaniel v. Paty, 435 U.S. 618, 622-25 (1978), which invalidated a Tennessee statute implementing a state constitutional provision barring ministers from serving as legislators.

²⁴⁶ As the Court stated in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), which sustained New York's tax exemption for church property: "Of course, churches as much as secular bodies and private citizens have that right [to speak to public issues]. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement." *Id.* at 670.

²⁴⁷ See Derr, *The First Amendment as a Guide to Church-State Relations: Theological Illusions, Cultural Fantasies, and Legal Practicalities*, in CHURCH, STATE, AND POLITICS 75 (J. Hensel ed. 1981).

logian Reinhold Niebuhr stated: "[his example] will have enabled people to learn to overcome the one disastrous mistake of German Protestantism: that is, the complete separation of faith from political life."²⁴⁸ Having affirmed the right, indeed the responsibility, of religious groups to speak on public issues, it should be stressed that merely because one has a right to speak does not mean it is always prudent to do so.²⁴⁹

In considering the separation principle embodied in the religion clauses, one must recognize that all three traditions informed the principle's meaning. We have already considered the influence of the centrist position in rejecting the view that the first amendment mandates a secular society or the exclusion of religion from politics. To an extent, the religion clauses also embody the Enlightenment and pietistic traditions of separation, and constitutional interpretation must reckon with them as well. These traditions look in two directions: to prevent governmental alliances with religion analogous to those in historical establishments and to protect churches and their adherents from governmental interference in religious matters.

The Enlightenment separationists contributed to the meaning of the establishment clause by recognizing that state-preferred churches corrupted governmental functions and inhibited the full attainment of religious liberty. To America's settlers and the Founders, the paradigm in understanding an establishment of religion was the Church of England. Historically, the Anglican establishment in England received the exclusive support and protection of the sovereign, who exercised control over both the "Lords Spiritual and Temporal" and over "all Manner of Jurisdictions, Privileges and Preheminences, in any wise touching or concerning any Spiritual or Ecclesiastical Jurisdiction."²⁵⁰ Civil and re-

²⁴⁸ E. BETHGE, *COSTLY GRACE* 185 (1979) (quoting a testimonial given by Reinhold Niebuhr in June 1945).

²⁴⁹ As the conferees of the 1981 Chief Justice Earl Warren Conference on "Church, State, and Politics" indicated:

There has never been an absolute wall between religion and politics. We recognize that the prophetic voices of the churches and their leaders are properly harsh at times in their judgments on civil society. But in leaving the sanctuary of the church for the political arena, with its clash of competing viewpoints and interests, religious leaders should be wary of exaggerating the religious and ecclesiastical authority with which they speak and the moral certainty of their positions. Their mission goes far beyond the political realm and can all too easily be compromised by excessive partisanship.

Findings and Recommendations, in *CHURCH, STATE, AND POLITICS*, *supra* note 247, at 132 (statement drafted by David S. Broder, adopted by the Conference with minor dissent) (emphasis deleted); see also A. REICHLEY, *supra* note 170, at 350-59 (cautioning that, while churches must involve themselves with the moral issues of the day, each church must be careful to avoid becoming merely political).

²⁵⁰ An Act to restore to the Crown the ancient Jurisdiction over the Estate Eccle-

ligious leaders were required to take the Oath of Supremacy recognizing the sovereign as head of the Anglican Church, and the "Lords Spiritual"—bishops and archbishops—sat in the House of Lords. Parliament dictated the content and use of the Book of Common Prayer, as well as the "Sacraments, Rites and Ceremonies" of the Church; it passed laws to insure the purity of the Church, provide public support for the establishment, compel attendance at religious services, enforce conformity to orthodox doctrine, and suppress heresy, dissent, and blasphemy.²⁵¹

When the Puritans settled in Massachusetts, they rejected the concept of ecclesiastical courts and distinguished civil and religious functions. They emphasized, however, that magistrates and clergy should "stand together & flourish the one being helpfull unto the other, in their distinct & due administrations."²⁵² In 1648, a synod of Congregational churches in New England expressed its understanding of an establishment in The Cambridge Platform, which endured as the standard for the established Congregational Church until 1780. The document directed the magistrate to raise public support for ministers if private contributions proved inadequate and to use the civil sword "for helping in & furthering" the Congregational churches. It urged the civil authority to restrain and punish "Idolatry, Blasphemy, Heresy, venting corrupt & pernicious opinions, that destroy the foundation, open contempt of the word preached, prophanation of the Lords day, disturbing the peaceable administration & exercise of the worship & holy things of God, & the like."²⁵³

In arguing that the Congregational Church in New England was a "state church," Williams maintained that it resembled the "English-Church" in that there was only one "religion and worship [which] is commanded or permitted."²⁵⁴ He stressed that the Congregational Church exhibited the five principal characteristics of an establishment. First, civil authorities required attendance at "common worship" and

siastical and Spiritual, and abolishing all foreign Powers repugnant to the same, 1 Eliz., ch. 1, §§ 1, 18 (1558).

²⁵¹ See *id.* § 19; An Act for the Uniformity of Common Prayer and Service in the Church, and Administration of the Sacraments, 1 Eliz., ch. 2 (1558). In the legislative history of the religion clauses, the Senate undoubtedly had the English establishment in mind when it adopted a proposal on September 9, 1789, prohibiting Congress from making any "law establishing articles of faith or a mode of worship." See 1 DE PAUW'S FIRST CONGRESS, *supra* note 94, at 166 (Senate Journal, Sept. 9, 1789); see also *supra* note 94 and accompanying text (discussing passage of this provision).

²⁵² THE CAMBRIDGE PLATFORM (Cambridge, Mass. 1648), in W. WALKER, THE CREEDS AND PLATFORMS OF CONGREGATIONALISM 194, 235 (1960).

²⁵³ *Id.* at 237.

²⁵⁴ R. WILLIAMS, THE BLOODY TENENT YET MORE BLOODY (London 1652), in 4 WRITINGS OF WILLIAMS, *supra* note 19, at 389 (emphasis deleted).

"holy times," compelled contributions to "holy officers," and prohibited dissenting faiths. Second, the civil power performed the function of overseeing "the conforming and reforming of the Church, the truth or falsehood of the Churches, Ministries or ministrations, ordinances, Doctrine, &c." Third, the magistrates punished "the Heretick, Blasphemer, [and] Seducer" by death or banishment. Fourth, the state used its power to enforce public "maintenance of the Worship, Priests and Officers." Finally, as with state or national churches, the representatives of the Congregational churches assembled in synods and councils.²⁵⁵

When one considers the English establishment and the colonial adaptations of this model, the essential characteristic was governmental compulsion to support a preferred church. Thus, civil authorities imposed harsh penalties for heresy, blasphemy, and dissenting views, and compelled church attendance, conformity to orthodox doctrine, and contributions to the preferred church. Perhaps the most powerful weapon for maintaining an establishment was the religious test oath, which proved effective in detecting dissenters and compelling allegiance to orthodox doctrine. The prohibition against government compulsion or coercion emerges repeatedly in the American heritage of religious liberty: the Maryland Act Concerning Religion (1649) guaranteed that Christians could not be in "any way compelled to the belief or exercise of any other religion";²⁵⁶ a repudiation of governmental coercion of conscience animated the works of Williams, Clarke and Penn;²⁵⁷ the Pennsylvania Frame of Government (1682) protected theists from being "compelled, at any time, to frequent or maintain any religious worship, place or ministry whatever," and the Charter of Privileges (1701) contained a virtually identical provision;²⁵⁸ many of the first state constitu-

²⁵⁵ *Id.* at 390-91 (emphasis deleted). To the best of our knowledge, this passage is the clearest definition of establishment in Williams' writings.

²⁵⁶ Act Concerning Religion (1649), in 1 MARYLAND ARCHIVES, *supra* note 16, at 246 (changed to conform to modern usage).

²⁵⁷ See *supra* notes 17-26 and accompanying text. Referring to the New England Way in church and state, Clarke declared in 1652: "But this outward forcing of men in matters of conscience towards God to believe as others believe, and to practise and worship as others do, cannot stand with the Peace, Liberty, Prosperity, and safety of a Place, Commonwealth, or nation." J. CLARKE, *ILL NEWES FROM NEW-ENGLAND: OR A NARATIVE OF NEW-ENGLANDS PERSECUTION* 72 (London 1652). In the preface to *The Great Case of Liberty of Conscience*, Penn stated: "[T]he enactment of such laws, as restrain persons from the free exercise of their consciences, in matters of religion, is but a knotting whip-cord to lash their own posterity; whom they can never promise to be conformed to a national religion." W. PENN, *THE GREAT CASE OF LIBERTY OF CONSCIENCE*, *supra* note 23, at 444 (changed to conform to modern usage).

²⁵⁸ See *supra* notes 26-27 and accompanying text.

tions prohibited compulsory attendance at or support of worship;²⁵⁹ dissenters often remonstrated that liberty of conscience meant freedom from governmental compulsion in religious matters, particularly from taxation for established churches;²⁶⁰ the central focus of Madison's *Memorial and Remonstrance* and Jefferson's Bill for Establishing Religious Freedom was the rejection of governmental authority to compel citizens to attend any religious worship or support any church;²⁶¹ and in the legislative history of the religion clauses, Madison emphasized that if Congress established a church, it might then enact laws compelling religious conformity.²⁶²

The historical record demonstrates that when a state sought to establish a church it did so by using the "civil sword" to compel beliefs and conduct supportive of that church. The essence of an establishment, therefore, was governmental coercion of conscience. In this respect, history lends support to Dean Choper's proposed test: "Government action should be held to violate the establishment clause if it meets two criteria: first, if its purpose is to aid religion; and second, if it significantly endangers religious liberty in some way by coercing, compromising, or influencing religious beliefs."²⁶³ Despite the historical centrality of co-

²⁵⁹ See *supra* notes 38-46 and accompanying text.

²⁶⁰ See, e.g., A Memorial of the Presbytery of Hanover (Oct. 24, 1776), reprinted in part in C. JAMES, *supra* note 54, at 73 (petitioning the Virginia legislature to exempt members of religious sects "from all taxes for the support of any church whatever, farther than what may be agreeable to their own private choice, or voluntary obligation"). The Warren Association, a Baptist committee founded to secure religious liberty, presented a memorial to the Massachusetts legislature in September 1775, protesting the imposition of religious taxes. The document read in part:

Yet, as we are persuaded that an entire freedom from being taxed by civil rulers to religious worship, is not a mere favor, from any man or men in the world, but a right and property granted us by God, . . . we should wrong our consciences in allowing that power to men, which we believe belongs only to God.

Memorial from the Warren Baptist Association to the Massachusetts Assembly (Sept. 1775), quoted in 2 I. BACKUS, A HISTORY OF NEW ENGLAND WITH PARTICULAR REFERENCE TO THE BAPTISTS 203-04 (2d ed. 1871 & reprint 1969) (1st ed. Boston & Providence 1777-96).

²⁶¹ See *supra* notes 59-65 and accompanying text; see also McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 938 (1986) (using the *Memorial and Remonstrance* to support the proposition that "legal compulsion to support or participate in religious activities would seem to be the essence of an establishment").

²⁶² See *supra* note 202.

²⁶³ Choper, *supra* note 190, at 948. For an article exploring the use of a similar test in the context of public education, see Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963). Professor McConnell also correctly observes: "Recognition of the centrality of coercion—or, more precisely, its opposite, religious choice—to establishment clause analysis would lead to a proscription of all government action that has the purpose and effect of coercing or altering religious belief or action." McConnell, *supra* note 261, at 940; see also Paul-

ercion, the Supreme Court has failed to take account of this element in its establishment clause jurisprudence, resorting instead to an amorphous formula premised on an ahistorical separation of church and state.²⁶⁴

While pietistic separationists contributed to establishment clause jurisprudence by campaigning vigorously for disestablishment, their more important legacy was the defense of values that animate the free exercise clause. Historically, the free exercise of religion encompassed both institutional and individual components; it included the right of churches to exist free from governmental interference²⁶⁵ and the right of persons to practice their religions in accordance with individual conscience. In contrast to Enlightenment rationalists, Roger Williams and others in the pietistic tradition built a wall of separation "not to prevent the state from becoming an instrument of 'priestcraft,' but in order to keep the holy and pure religion of Jesus Christ from contamination by the slightest taint of earthly support."²⁶⁶ They fought for institutional separation because the Erastian establishments in the colonies, patterned after the Church of England, threatened "not only the purity but also the very life and being of religion."²⁶⁷ Adopting a theme common in Williams' writings, Backus warned that a Christian church that gave itself to the civil authorities rather than to Christ was committing spiritual "*adultery or whoredom*."²⁶⁸ Civil magistrates who coerced conscience, the mediator between man and the Creator, invaded a realm belonging to God alone; such usurpation of authority produced hypocrisy, weakened virtue, and threatened the peace, prosperity, and

sen, *supra* note 162, at 336 (proposing a new effects test under the establishment clause that would ask "whether government policy has coercive or discriminatory effects on an individual's religious exercise"); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 693 (1968) (proposing that the establishment clause "should be read to prohibit only aid which has as its motive or substantial effect the imposition of religious belief or practice").

²⁶⁴ In *Engel v. Vitale*, 370 U.S. 421 (1962), the Court concluded that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Id.* at 430. The "amorphous formula" referred to above is, of course, the tripartite establishment clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To pass muster under this test, a statute must have a secular purpose, it must have a primary effect which neither advances nor inhibits religion, and it must not foster excessive governmental entanglement with religion. *Id.* at 612-13.

²⁶⁵ Legal commentators have characterized this component as the "right to church autonomy." See sources cited *supra* note 228.

²⁶⁶ Miller, *Roger Williams: An Essay in Interpretation*, in 7 WRITINGS OF WILLIAMS, *supra* note 19, at 6.

²⁶⁷ I. BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY, *supra* note 142, at 334.

²⁶⁸ *Id.* at 333.

unity of society.

The pietists' condemnation of governmental force in religious matters stemmed from a theological conviction that God had ordained church and state to carry out essentially distinct, although complementary, functions, and that the confounding of these two functions violated the divine order. The church was armed with truth and light to persuade, edify, and serve, while the state was armed with the sword to preserve the peace by regulating social affairs and punishing immoral conduct.²⁶⁹ This "two kingdoms" view rested on a jurisdictional notion that there is a realm of religious belief and experience beyond the power of government;²⁷⁰ state intrusion into this realm threatened authentic faith and, in extreme cases, justified civil disobedience for, as the pietists stressed, ultimate allegiance belonged to God. In this regard, they often invoked the New Testament account of the Sanhedrin ordering the apostles to stop preaching in Jerusalem. Peter and the other apostles refused, responding, "We ought to obey God rather than men."²⁷¹

It bears emphasis that, in their struggle to keep the hands of the state off the church, pietistic separationists did not advocate the absolute supremacy of the individual conscience, even if religiously motivated, over the legitimate concerns of civil government. One of the strongest strains in their thought was respect for temporal authority, for as the apostle Paul indicated: "Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God."²⁷² Without government and social order, there could be no civil or religious liberty. In the preface to his *Frame of Government*, Penn quoted Paul's injunction in asserting that government, although lower in dignity than the heavenly kingdom, was "a part of religion itself, a thing sacred in its institution and end."²⁷³ In contrasting the two kingdoms, Penn stated:

For, if [government] does not directly remove the cause, it

²⁶⁹ See *id.* at 315.

²⁷⁰ Enlightenment separationists and, to a lesser extent, political centrists also adhered to a jurisdictional view, but for reasons stemming primarily from natural law and political philosophy, rather than from Scripture and theology.

²⁷¹ Acts 5:29 (King James) (Biblical quotations are from the King James version because it was the one used by almost all the pietistic separationists). Thus, Backus stated: "We view it to be our incumbent duty to render unto Caesar the things that are his but also that it is of as much importance not to render unto him anything that belongs only to God, who is to be obeyed rather than any man." I. BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY, *supra* note 142, at 317.

²⁷² Romans 13:1 (King James).

²⁷³ PA. FRAME OF GOVERNMENT of 1682, Preface, in 5 THORPE, *supra* note 18, at 3053.

crushes the effects of evil, and is as such, (though a lower, yet) an emanation of the same Divine Power, that is both author and object of pure religion; the difference lying here, that the one is more free and mental, the other more corporal and compulsive in its operations²⁷⁴

While serving as governor of Rhode Island, Williams explored the interaction of religious conscience and civil duties in his famous letter to the town of Providence.²⁷⁵ Prompted by Baptists and Quakers who had objected on religious grounds to serving in the city's militia, Williams wrote that liberty of conscience did not mandate excusal from social duties connected with the "common peace or preservation." Employing a favorite simile, he compared society to a ship at sea, with all aboard, Catholic, Protestant, Jew, and Turk alike, embarked on a journey. Williams pleaded for a liberty of conscience under which none of those aboard would "be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any."²⁷⁶ The ship's commander, however, retained authority to ensure the peace and safety of the vessel, specifically to "compel and punish" those who refused "to help, in person or purse, towards the common charges or defence," who disobeyed his orders concerning "the common peace or preservation," or who mutinied or taught "that there ought to be no commanders."²⁷⁷ This letter discloses that Williams basically adhered to the Puritan view of governmental authority to enforce temporal civility and morality. As Professor Morgan indicates, Williams' commitment to liberty of conscience must be understood in the context of the civil magistrates' duty "to punish anyone whose conscience led him to undertake actions against the public safety and welfare."²⁷⁸

Even with similar theological convictions, pietistic separatists differed among themselves concerning the scope and interaction of the two kingdoms: to what extent, if at all, should believers be involved in government? To what extent should the church provide moral support for government? When should it play a "prophetic" role? What conduct prohibited by the Decalogue should the temporal authorities punish? At what point does conflict between the two kingdoms justify civil disobedience? Williams, Penn, and Backus diverged on these issues. At

²⁷⁴ *Id.*

²⁷⁵ See Letter from Roger Williams to the Town of Providence (Jan. 1655), in 6 WRITINGS OF WILLIAMS, *supra* note 19, at 278.

²⁷⁶ *Id.* at 279.

²⁷⁷ *Id.*

²⁷⁸ E. MORGAN, *supra* note 17, at 134.

one end of the spectrum, Williams approached the issue of Christian involvement in government cautiously, asserting that the magistrates had no authority to enforce the first table of the Decalogue, which consisted of the four "spiritual" commandments against idolatry, image-worship, blaspheming God's name, and breaking the Sabbath.²⁷⁹ He therefore opposed test oaths, Sabbath laws, and the punishment of blasphemy, stating that it contradicted Christian principles for the state "to impose upon the souls of the people, a religion, a worship, a ministry, oaths (in religious and civil affairs), tithes, times, days, marryings and burials in holy ground."²⁸⁰ Instead, the magistrates' principal duty with respect to religion was to remove legal obstructions to religious exercise and foster an environment conducive to the "free and absolute permission of the consciences of all men, in what is merely spiritual."²⁸¹ At the other end of the spectrum, Penn urged Christian involvement in government and, while granting broad religious freedom in his colony, thought that the state should affirmatively encourage Christianity through test oaths, Sabbath laws, and the punishment of blasphemy and "wild and loose" behavior.²⁸² Backus stood between Williams and Penn. He vigorously opposed test oaths and espoused a broader view of separation than Penn but, like Penn, he encouraged Christians to become magistrates and supported Sabbath laws, the punishment of blasphemy, and the proclamation of days of thanksgiving.²⁸³

D. *The Principle of Accommodation*

The special place accorded religious freedom by the Founders is revealed in the concept of accommodation, a free exercise doctrine that may be defined as an area of allowable and, in some cases, compelled governmental deference to the religious needs of a people holding a variety of beliefs.²⁸⁴ Generally implicated when tension arises between civil duties and religious conviction, accommodation requires a delicate balance between government's duty to promote the cohesiveness necessary for an ordered society and its responsibility to honor the religious

²⁷⁹ See *Exodus* 20:3-11. For an insightful discussion of Williams' views concerning the role of government, see E. MORGAN, *supra* note 17, at 115-42.

²⁸⁰ R. WILLIAMS, *THE HIRELING MINISTRY NONE OF CHRIST* (London 1652), in 7 WRITINGS OF WILLIAMS, *supra* note 19, at 178 (changed to conform to modern usage; emphasis deleted).

²⁸¹ *Id.* (changed to conform to modern usage; emphasis deleted).

²⁸² See *supra* notes 26-27 and accompanying text.

²⁸³ See *supra* notes 144-48 and accompanying text.

²⁸⁴ The concept is discussed at length in Adams & Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DE PAUL L. REV. 317 (1988), and McConnell, *supra* note 170.

practices of citizens by refraining from unnecessary or burdensome regulation. Before considering the historical roots of accommodation, it would be helpful to illustrate the social importance of the concept and discuss its use by the Supreme Court.

Accommodation takes on added significance in a society characterized by expansive government and religious pluralism because, accompanying such growth, there is an increase in the tension between governmental power and diverse convictions. The task of resolving this tension has fallen primarily to the courts, which have considered numerous cases involving religious groups or individuals seeking exemptions from laws prohibiting conduct deemed inconsistent with the public welfare or from laws imposing social and civic duties. In the category of laws prohibiting conduct, for example, courts have wrestled with religious defenses to prosecutions for disruptive public behavior, Sunday business or labor, commercial fortune telling, the handling of poisonous snakes, mail fraud and deceptive practices, the practice of medicine without a license, and the use of illegal substances such as peyote. In the category of social and civic duties, courts have entertained religious claims to be excused from legally required jury duty, military service, vaccination and other medical procedures, military science courses in colleges, flag-salutes and the pledge of allegiance in public schools, naturalization oaths, social security coverage, and parental care for children in meeting educational and medical needs.²⁸⁵

²⁸⁵ Cases in the first category, those involving efforts to secure religious exemptions from laws prohibiting conduct, include: *Cantwell v. Connecticut*, 310 U.S. 296, 307-11 (1940) (breach of peace conviction of a Jehovah's Witness for playing religiously offensive record to two pedestrians on a public street held to violate free exercise and free speech clauses); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (rejecting claim that application of Sunday closing laws to Orthodox Jewish merchants violated their free exercise rights); *City of St. Louis v. Hellscher*, 295 Mo. 293, 242 S.W. 652 (1922) (sustaining a law prohibiting commercial fortune telling despite claim that the practice constituted a "religious" ritual); *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975) (enjoining members of the Holiness Church from handling poisonous snakes on the ground that the practice posed a serious danger to the public welfare), *cert. denied*, 424 U.S. 954 (1976); *United States v. Ballard*, 322 U.S. 78 (1944) (reversing convictions of members of the "I Am" movement for mail fraud on the ground that a jury determination of the truth or falsity of their religious beliefs violated the free exercise clause); *State v. Verbon*, 167 Wash. 140, 8 P.2d 1083 (1932) (sustaining application of medical standards and licensing to religious, as well as secular, healers); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (criminal convictions of American Indians for using peyote in a religious ceremony held to violate the free exercise clause).

For cases in the second category, those involving religious exemptions from social and civic duties, see *In re Jenison*, 276 Minn. 136, 125 N.W.2d 588 (1963) (*per curiam*) (reversing a contempt of court conviction of an individual who refused on religious grounds to serve as a juror); *United States v. Seeger*, 380 U.S. 163 (1965) (holding that an individual opposed to war because of "religiously" based moral principles

In resolving cases in both categories, courts in the nineteenth and early twentieth centuries generally applied a concept known as the secular regulation rule, which provided that there is "no constitutional right to exemption on religious grounds from the compulsion of a general regulation dealing with non-religious matters."²⁸⁶ These early cases, however, were decided almost exclusively under state constitutional provisions before the advent of the incorporation doctrine and the welfare state. In addition, they often involved requests for religious accommodation at a time when courts generally exercised great restraint in assessing the constitutionality of general welfare measures. Rather than being asked to carve out religiously-based exemptions, courts today are increasingly called upon to determine the constitutionality of accommodations granted by the legislative branch. Although the Supreme Court has largely abandoned the secular regulation rule in favor of a balancing of interests approach, the rule's principal rationale—that religious groups and citizens stand before the law on equal terms with other groups and citizens—continues to influence the jurisprudence of

was entitled to conscientious objector status); *Kolbeck v. Kramer*, 46 N.J. 46, 214 A.2d 408 (1965) (*per curiam*) (the state may require vaccinations for all college students without granting religious exemptions, but if it grants such exemptions it may not prefer one religion over another); *Hamilton v. Regents of University of California*, 293 U.S. 245 (1934) (holding that the liberty guaranteed by the due process clause did not require exemption of religious pacifist students from a mandatory college course in military science); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (sustaining claim of Jehovah's Witnesses that compulsory flag-salute and pledge of allegiance in public schools violates first amendment); *Girouard v. United States*, 328 U.S. 61 (1946) (Seventh-day Adventist opposed to bearing arms but willing to take oath of allegiance and to serve as noncombatant entitled to citizenship); *United States v. Lee*, 455 U.S. 252 (1982) (requiring Amish farmer who employs farm workers to pay social security taxes does not violate the free exercise clause); *Jehovah's Witnesses in Wash. v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967) (three-judge court) (sustaining juvenile law authorizing state officials to make children of Jehovah's Witnesses wards of the state for administering necessary medical care), *aff'd*, 390 U.S. 598, *reh'g denied*, 391 U.S. 961 (1968).

For sources collecting and discussing cases in both categories, see A. JOHNSON & F. YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* (1948); D. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* 38-52 (1962); W. TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* (1948); Giannella, *supra* note 188; Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115 (1973).

²⁸⁶ D. MANWARING, *supra* note 285, at 51 (emphasis deleted). The Court adopted this approach in the criminal law context in *Reynolds v. United States*, 98 U.S. 145 (1879), in which it concluded that the free exercise clause did not confer a right on "those who make polygamy a part of their religion" to be "excepted from the operation of [anti-polygamy laws]." *Id.* at 166. The Court stressed that to do so would introduce "a new element into criminal law"—those practicing polygamy because of religious conviction would be acquitted, while all other polygamists would be punished. *Id.* It should be emphasized that *Reynolds* rested on the conviction that monogamy was an indispensable institution for the survival of American culture. See *id.* at 164-66.

the religion clauses. This policy of equality or fairness has figured prominently in the Court's search for a coherent theory to interpret the religion clauses, posing a fundamental and recurring theme under the free exercise clause: whether the Constitution permits government, at least in some instances, to afford special treatment to religious groups and citizens? In other words, does religion enjoy a special constitutional status in American culture. The constitutional text, the rise of religious liberty in America, the views of the Founders, and the generating history of the religion clauses clearly support an affirmative answer to these questions.

While one might disagree with particular applications of the principle, the Supreme Court has correctly recognized that the free exercise clause sometimes compels and, at other times, counsels accommodation of religious belief and practice. At least three categories have emerged in this regard. One line of cases, following the leading decision in *Wisconsin v. Yoder*,²⁸⁷ holds that the free exercise clause sometimes affirmatively compels governmental accommodation of religion. Thus, in *Yoder*, the Court concluded that the clause mandated the exemption of Amish children from that part of Wisconsin's compulsory education law requiring high school attendance. The Amish parents had sent their children to school through the eighth grade, but had declined to enroll them in high school because the "worldly values" prevalent in secondary education contravened their faith. A second group of cases involves situations in which accommodation is neither compelled by the free exercise clause nor forbidden by the establishment clause. This category generally presents judicial review of governmental measures designed to recognize citizens' religious needs. In *Zorach v. Clauson*,²⁸⁸ for example, the Court sustained a New York City program that allowed public schools to excuse students to receive religious instruction off school premises for one hour each week. Other accommodations falling in the "permissible zone" between the clauses include the tax exemption for religious property²⁸⁹ and the conscientious objector exemption.²⁹⁰ A third category involves statutory accommodations that

²⁸⁷ 406 U.S. 205 (1972); see also *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that the free exercise clause compelled the state of South Carolina to grant unemployment benefits to a Seventh-day Adventist who could not find employment because she refused to work on Saturday, her Sabbath).

²⁸⁸ 343 U.S. 306 (1952).

²⁸⁹ See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). One school of thought argues that the free exercise clause compels tax exemption for religious property, but the Court refused to adopt this rationale in *Walz*, and its opinion suggests otherwise. For an extensive defense of the religious tax exemption on social policy grounds, see D. KELLEY, *WHY CHURCHES SHOULD NOT PAY TAXES* (1977).

²⁹⁰ In the Selective Draft Law Cases, 245 U.S. 366 (1918), the Court summarily

transgress the establishment clause. This occurred in *Estate of Thornton v. Caldor, Inc.*,²⁹¹ in which the Court concluded that a Connecticut statute attempting to accommodate religious worship by providing "Sabbath observers with an absolute and unqualified right not to work on their Sabbath" impermissibly advanced religion.²⁹²

History does not yield the nuanced approach to accommodation prevalent in current cases, for the colonists lived in a more homogeneous culture and adhered to a concept of limited government. Even in the seventeenth century, however, sufficient pluralism existed among Christian groups for the colonists to appreciate the nature of the problem. The Maryland Act Concerning Religion reflected this pluralism in banning the offensive use of names such as "an heretic, schismatic, idolator, Puritan, Independent, Presbyterian, popish priest, Jesuit, Jesuited papist, Lutheran, Calvinist, Anabaptist, Brownist, Antinomian, Barrowist, Roundhead, Separatist, or any other [religious] name or term in a reproachful manner."²⁹³ As noted above, Williams addressed the issue of conscientious objection to military service as early

dismissed the contention that the religious exemptions of the 1917 draft law violated the religion clauses. *See id.* at 389-90. In *Gillette v. United States*, 401 U.S. 437 (1971), the Court sustained the Military Selective Service Act of 1967 against the claim that the act's failure to exempt those objecting to particular wars, along with objectors to all war, violated the religion clauses. *See id.* at 448-60. The Court's decisions construing the exemption also strongly suggest its constitutionality. *See United States v. Seeger*, 380 U.S. 163, 165-66 (1965) (avoiding the constitutional issue by broadly interpreting the exemption's requirement of a belief in a Supreme Being); *see also Welsh v. United States*, 398 U.S. 333, 335 (1970) (avoiding the constitutional issue on the basis of *Seeger*).

²⁹¹ 472 U.S. 703 (1985).

²⁹² *Id.* at 710-11. In a concurring opinion joined by Justice Marshall, Justice O'Connor distinguished the Connecticut statute from provisions in Title VII of the Civil Rights Act of 1964 which require private employers reasonably to accommodate the religious practices of employees. She reasoned that the Title VII provisions were neither compelled by the free exercise clause nor forbidden by the establishment clause. Rather than creating an impermissible endorsement of religion, the provisions had the valid secular purpose of "assuring employment opportunity to all groups in our pluralistic society." *Thornton*, 472 U.S. at 712 (O'Connor, J., concurring).

In *Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987), the Court held that exempting the secular activities of religious organizations from Title VII's prohibition against religious discrimination in employment did not violate the establishment clause. In applying the three-prong *Lemon* test, *see supra* note 264, the Court specifically recognized that it was "a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 107 S. Ct. at 2868. *Amos* suggests that the Court is attempting to reconcile the tension between its establishment clause jurisprudence and the accommodation principle by broadening the "permissible zone" between the clauses, the second category discussed above.

²⁹³ Act Concerning Religion (1649), in 1 MARYLAND ARCHIVES, *supra* note 16, at 245 (changed to conform to modern usage).

as 1655.²⁹⁴ In his letter to Providence, Williams asserted only that the Quakers and Baptists in question could not claim a right, divine or otherwise, to exemption from militia service. He did not state that it would be inappropriate for government to accommodate conscientious objectors. His insistence that every qualified male serve in the militia probably resulted from the turmoil in the colony, the impending threat of Indian raids, and friction with the neighboring colony of Massachusetts Bay.

The concept of accommodation finds more immediate support in the thought and actions of the Founders, who were well aware of potential conflicts between religious conviction and social duties. In 1793, just two years after the states ratified the Bill of Rights, an interesting accommodation case arose in Pennsylvania involving a Jew named Jonas Phillips.²⁹⁵ The court fined Phillips for refusing to testify on his Sabbath, but later remitted the fine when the defendant waived the benefit of his testimony. Unfortunately, the reporter only summarized the case and did not record the court's justification for imposing the fine.²⁹⁶ Although this early court did not accommodate Phillips' religious needs, the Founders manifested a sensitivity to religious practice in the free exercise clause, in article VI of the Federal Constitution, and in state constitutional oath provisions and exemptions for conscientious objectors.

One of the clearest illustrations of the Founders' affirmative accommodation of religious belief came in the loyalty requirement of article VI.²⁹⁷ Certain minority religious groups, most notably the Quakers, refused on Biblical grounds to take oaths, but were willing to make affirmations. In recognition of this, the Framers drafted article VI to require federal and state officials to be "bound by Oath or Affirmation, to support this Constitution."²⁹⁸ Legislative history confirms that the

²⁹⁴ See *supra* notes 275-78 and accompanying text.

²⁹⁵ See *Stansbury v. Marks*, 2 U.S. (2 Dall.) 213 (1793). This presumably was the same citizen who petitioned Congress concerning the religious test oath in the Pennsylvania Constitution of 1776. See *supra* note 80 and accompanying text.

²⁹⁶ The reporter states only:

In this cause (which was tried on Saturday, the 5th of April), the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The court, therefore, fined him 10*l*.; but the defendant, afterwards, waiving the benefit of his testimony, he was discharged from the fine.

Stansbury, 2. U.S. (2 Dall.) at 213.

²⁹⁷ See *supra* notes 69-78 and accompanying text.

²⁹⁸ U.S. CONST. art. VI, cl. 3 (emphasis added). Before assuming office, the President-elect must take an "Oath or Affirmation" requiring him or her to "solemnly swear (or affirm)" to faithfully execute the office and to defend the Constitution. U.S. CONST. art. II, § 1, cl. 8. The wording of the presidential oath undoubtedly derived

choice of wording was deliberate. Prior to August 30, 1787, the various loyalty proposals considered by the Convention referred to officials being bound only by an "oath."²⁹⁹ Both the Convention journal and Madison's notes reveal that on August 30 the body arrived at what is now article VI by adding the words "or affirmation" and Pinckney's clause banning a federal test oath.³⁰⁰ Joseph Story further confirmed the Framers' specific intent to accommodate religion in the article, indicating in his *Commentaries on the Constitution* that it "permitted a solemn affirmation to be made instead of an oath" because some denominations were "conscientiously scrupulous of taking oaths."³⁰¹

The accommodation in article VI undoubtedly was derived from the state constitutions, which contained numerous provisions permitting Quakers and others to meet civil obligations through affirmations rather than oaths. Prior to the Federal Convention, every state except Massachusetts, North Carolina, and Virginia showed such a sensitivity to religious belief in their first constitutions. The Maryland Constitution of 1776 contained the most explicit example:

That the manner of administering an oath to any person, ought to be such, as those of the religious persuasion, profession, or denomination, of which such person is one, generally esteem the most effectual confirmation, by the attestation of the Divine Being. And that the people called Quakers, those called Dunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation³⁰²

The Delaware Constitution of 1776 required an officeholder to take a loyalty "oath, or affirmation, if conscientiously scrupulous of taking an oath."³⁰³ Pennsylvania and New Hampshire incorporated similar provisions in their first constitutions.³⁰⁴ Legislators in New Jersey took an

from the same religious considerations that motivated the wording of article VI.

²⁹⁹ See 1 FARRAND'S RECORDS, *supra* note 75, at 22 (Madison, May 29); *id.* at 28 (Paterson, May 29); *id.* at 122 (Madison, June 5); *id.* at 194 (Journal, June 11); *id.* at 203-04 (Madison, June 11); *id.* at 206-07 (Yates, June 11); *id.* at 227 (Journal, June 13); 2 *id.* at 84 (Journal, July 23); *id.* at 87-88 (Madison, July 23).

³⁰⁰ 2 FARRAND'S RECORDS, *supra* note 75, at 461 (Journal, Aug. 30); *id.* at 468 (Madison, Aug. 30).

³⁰¹ 3 J. STORY, *supra* note 136, § 1838, at 703.

³⁰² MD. CONST. of 1776, Declaration of Rights, art. XXXVI, in 3 THORPE, *supra* note 18, at 1690.

³⁰³ DEL. CONST. of 1776, art. 22, in 1 THORPE, *supra* note 18, at 566.

³⁰⁴ The Pennsylvania Constitution of 1776 required legislators to "swear (or affirm)" faithfully to discharge their duties, PA. CONST. of 1776, Frame of Government, § 10, in 5 THORPE, *supra* note 18, at 3085 (emphasis deleted), and required public officials to take an "oath or affirmation of allegiance, and general oath of office." *Id.*

"oath or affirmation" under which they "solemnly declare[d]" to discharge their duties faithfully.³⁰⁵ Under the New York Constitution of 1777, electors could be required to "take an oath, or, if of the people called Quakers, an affirmation, of allegiance to the State."³⁰⁶ Electors in Georgia subscribed to an "oath or affirmation" of allegiance, and those in South Carolina could be compelled to "take an oath or affirmation of qualification."³⁰⁷ South Carolina also permitted a citizen, "when called to make an appeal to God as a witness of truth," to do so in the manner "which is most agreeable to the dictates of his own conscience."³⁰⁸

In addition to the accommodations in article VI and the state constitutional oath provisions, the Founders demonstrated their solicitude towards religious practice in the area of conscientious objection to military service. When Madison proposed his constitutional amendments in the First Congress, he included a provision that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person."³⁰⁹ Like the accommodation in article VI, this proposal mirrored provisions in the state constitutions. A provision in the Pennsylvania Constitution of 1776, adopted in substantially similar form by Delaware, New Hampshire, and Vermont, read: "Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent"³¹⁰ The New York Con-

§ 40, at 3090. The loyalty oath for civil officers in New Hampshire permitted Quakers and others "scrupulous of swearing," merely to affirm and to end their declaration with, "This I do under the pains and penalties of perjury," rather than with, "So help me God." N.H. CONST. of 1784, Form of Government, "Oaths and Subscriptions," in 4 THORPE, *supra* note 18, at 2468 (emphasis deleted). Vermont did not become a state until 1791, but it enacted a constitution in 1777 which contained loyalty provisions virtually identical to those of Pennsylvania, *see* VT. CONST. of 1777, ch. II, §§ IX, XXXVI, in 6 THORPE, *supra* note 18, at 3743, 3747, except that it added the requirement that voters take an "oath (or affirmation)" of loyalty, *id.* § 6, at 3742.

³⁰⁵ N.J. CONST. of 1776, art. XXIII, in 5 THORPE, *supra* note 18, at 2598.

³⁰⁶ N.Y. CONST. of 1777, art. VIII, in 5 THORPE, *supra* note 18, at 2631.

³⁰⁷ GA. CONST. of 1777, art. XIV, in 2 THORPE, *supra* note 18, at 780; S.C. CONST. of 1778, art. XIII, in 6 THORPE, *supra* note 18, at 3252.

³⁰⁸ S.C. CONST. of 1778, art. XXXVIII, in 6 THORPE, *supra* note 18, at 3256.

³⁰⁹ 1 ANNALS, *supra* note 89, at 434 (June 8, 1789). *See supra* notes 90-93 and accompanying text. Madison's conscientious objector provision was not without precedent at the federal level. In 1775, the First Continental Congress granted an exemption from military service to those religiously scrupulous of bearing arms. It concluded: "[a]s there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but liberally recommend it to them, to contribute liberally . . . and to do all other services . . . which they can consistently with their religious principles." 2 JOURNALS OF THE CONTINENTAL CONGRESS 189 (W. Ford ed. 1905).

³¹⁰ PA. CONST. of 1776, Declaration of Rights, art. VIII, in 5 THORPE, *supra* note 18, at 3083. For the Delaware, New Hampshire, and Vermont provisions, *see* DEL. DECLARATION OF RIGHTS of 1776, § 10, *reprinted in* SOURCES, *supra* note 12,

stitution of 1777 excused Quakers "averse to the bearing of arms" on the condition that they pay an equivalent "in lieu of their personal service."³¹¹ Perhaps because it regarded the issue a state matter, the House did not forward Madison's proposal to the Senate.

The House debate on the exemption, however, is instructive concerning the Framers' views on accommodation. On August 17, 1789, it considered a derivative of Madison's clause that read, "but no person religiously scrupulous shall be compelled to bear arms."³¹² Representative Gerry feared that those in power would use this provision to destroy the Constitution. By broadly construing the exemption, they could weaken the state militias and open the way for a standing army, a dangerous threat to liberty. Gerry desired to narrow the exemption by confining it "to persons belonging to a religious sect scrupulous of bearing arms." Representative Jackson "was willing to accommodate," but only if those exempted paid an equivalent for a substitute. Noting that the exemption probably would not influence many to become "Quakers or Moravians," he stressed the injustice of exempting some men without obligation while most others defended their country. Roger Sherman doubted that those religiously opposed to bearing arms would be willing to get substitutes or pay an equivalent. He argued that the clause was not essential, emphasizing that the states controlled the militias, and that American government was not "arbitrary." In addition, Sherman thought it unwise to exempt a whole sect, because some Quakers, for example, would be willing to defend their country irrespective of the doctrines of their sect. Representative Vining opposed the suggestion "to compel a man to find a substitute," agreeing with the proposal as it stood. Representative Benson closed the debate by moving to strike the exemption. Maintaining that no citizen could "claim this indulgence" as a natural right, he asserted that it would be impossible to state the exemption unambiguously, and that the matter should therefore be left to the "benevolence of the Legislature." Benson stressed that the exemption would transfer the entire matter to the judiciary, and that the legislatures would be sensitive to the needs of citizens. The House defeated Benson's motion to strike the provision by a vote of 24 to 22.³¹³

This interchange discloses that the Framers not only appreciated

at 339; N.H. CONST. of 1784, pt. I (Bill of Rights), art. XIII, in 4 THORPE, *supra* note 18, at 2455; VT. CONST. of 1777, ch. I (Declaration of Rights), art. IX, in 6 THORPE, *supra* note 18, at 3741.

³¹¹ N.Y. CONST. of 1777, art. XL, in 5 THORPE, *supra* note 18, at 2637.

³¹² 1 ANNALS, *supra* note 89, at 749 (Aug. 17, 1789).

³¹³ For the House debate on the conscientious objector provision, see *id.* at 750-51.

the delicate nature of accommodation, but placed a high value on religious conviction, even when it conflicted with a fundamental social duty. All of them appeared to agree that legislatures possessed the authority constitutionally or statutorily to exempt conscientious objectors. Indeed, most agreed with Benson that the legislatures should "possess humanity enough to indulge [conscientious objectors] in a matter they are so desirous of."³¹⁴ The more troublesome issue was whether the exemption should be provided in the nation's fundamental law. The Framers understood the problems attending such an accommodation, issues such as delineating federal and state authority, defining and applying the exemption, determining the proper role of the judiciary, and recognizing the social impact of the provision and the need for fairness. But they also recognized that accommodation must occur if religious liberty was to flourish, particularly in a society characterized by pluralism and expansive government. It deserves emphasis that the Founders accorded religious exercise a special status in the Constitution³¹⁵ and that, given the changes in the social and legal landscapes, the preservation of this status necessitates a broad view of accommodation.³¹⁶

E. *The Principle of Benevolent Neutrality*

The principle of neutrality, like that of separation, can be a source of great confusion if uprooted from the generating history of the religion clauses. As Justice Harlan observed, neutrality is "a coat of many colors,"³¹⁷ depending for content on the context and nature of its use. In the framework of history, religious neutrality derives specific meaning from the nation's commitment to the ideals of equality and voluntarism. The first of these found classic expression in the Declaration of Independence, which affirmed that individuals, while perhaps not equal in ability, intelligence, or other criteria, are equal as moral

³¹⁴ *Id.* at 751.

³¹⁵ For an article exploring the Court's reasons for affording religion a unique status, see Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83.

³¹⁶ This discussion merely shows that the principle of accommodation receives substantial support from history; exploring the exact contours of the principle is beyond the scope of this Article. The concept of permissible accommodation of religion is discussed in Adams & Gordon, *supra* note 284, at 318-22, in which the authors assert that an accommodation should relieve a governmentally-imposed burden on religious conduct only when the danger of establishment is remote. Taking a broader view of accommodation, Professor McConnell asserts that between the establishment and free exercise clauses there "exists a class of permissible government actions toward religion, which have as their purpose and effect the facilitation of religious liberty." McConnell, *supra* note 170, at 3.

³¹⁷ *Board of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

agents before God and the law.³¹⁸ In light of traditional establishments, the Founders conceived of religious equality primarily in terms of a government neither endorsing nor preferring any religious group over any other; in principle, all religions stood on an equal footing legally.³¹⁹ Voluntarism, the antithesis of compulsion, rests largely on the conviction that government should be neutral in religious matters because "both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit."³²⁰ When a state uses its coercive power to favor an establishment, it infringes on the freedom of churches, established and dissenting alike, and on the right of their adherents to act voluntarily in accordance with conscience.

With these general observations in mind, it would be helpful to review the Supreme Court's concept of neutrality and then to consider scholarly proposals concerning the principle. When the Court invalidated state-sponsored Bible reading in public schools, it did so under a "strict neutrality" approach embodying what are now the first two prongs of the tripartite establishment clause test: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."³²¹ The Bible reading exercise, it concluded, violated the command that "the Government maintain strict neutrality, neither aiding nor opposing religion."³²² Five years later, the Court employed the neutrality principle and its two-prong test to strike down an Arkansas statute that prohibited teaching evolution in public schools.³²³ The decision, which did not refer to "strict" neutrality, defined the concept as

³¹⁸ See *supra* notes 32-36 and accompanying text (discussing the Declaration of Independence). Although minorities, immigrants, women, and other segments of our society have struggled to attain equal treatment, their success in appealing to and achieving equality derives, in the first instance, from the nation's normative commitment to the ideal of equality.

³¹⁹ For extended discussions of the ideal of equality as a value animating the religion clauses, see Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193; Paulsen, *supra* note 162, at 326-71; see also Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (arguing that equal liberty of expression is the basic principle underlying the first amendment).

³²⁰ Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Nonestablishment Principle* (pt. 2), 81 HARV. L. REV. 513, 517 (1968) (footnote omitted).

³²¹ *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

³²² *Id.* at 225. In his concurring opinion, Justice Goldberg indicated that neutrality requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Id.* at 305 (Goldberg, J., concurring).

³²³ See *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968).

follows:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.³²⁴

Two years later the Court explicitly abandoned "strict" neutrality. Confronted with a choice between a rigid judicial test of recent vintage and tax exemptions for church property, which are embedded in American history and culture, the Court in *Walz v. Tax Commission*³²⁵ had little difficulty choosing the latter. To pose the dilemma was to resolve it. Tempering the neutrality concept with accommodation values, the *Walz* Court stressed that constitutional neutrality "cannot be an absolutely straight line; rigidity could well defeat the basic purpose of [the religion clauses], which is to insure that no religion be sponsored or favored, none commanded, and none inhibited."³²⁶ In announcing the concept of "benevolent" neutrality, it concluded that between the clauses there was "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."³²⁷

Two very different propositions emerge from the Court's definition of neutrality under the establishment clause: government must be neutral between religions, and it must be neutral between religion and nonreligion. The first proposition, that government may not prefer one religion over any other, receives overwhelming support in the American tradition of church and state.³²⁸ In the legislative history of the religion clauses, Madison noted that the prevailing fear was that one or two sects "might obtain a pre-eminence" and create an establishment.³²⁹ When New York ratified the Constitution on July 26, 1788, it enumerated the rights deemed consistent with the Constitution. Included

³²⁴ *Id.* at 103-04 (footnote omitted).

³²⁵ 397 U.S. 664, 680 (1970).

³²⁶ *Id.* at 669.

³²⁷ *Id.*

³²⁸ The thesis that the founding generation understood nonestablishment primarily, if not exclusively, as a prohibition against the granting of a preference to any one religious denomination is advanced in C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 83, at 204-09.

³²⁹ 1 ANNALS, *supra* note 89, at 731 (Aug. 15, 1789); see also *supra* note 202 (discussing the legislative history of the religion clauses).

among these was, "[t]hat the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."³³⁰ Rhode Island, the state affording the greatest degree of religious liberty, placed a similar provision in its ratification document.³³¹

The early constitutions of ten of the first thirteen states contained provisions prohibiting governmental preference among religions or among Christian sects. The Delaware Constitution of 1776 declared that, "[t]here shall be no establishment of any one religious sect in this State in preference to another."³³² Georgia, New Jersey, North Carolina, and Pennsylvania included substantially similar provisions in early constitutions.³³³ The New York Constitution of 1777 guaranteed "the free exercise and enjoyment of religious profession and worship, without discrimination or preference"; South Carolina included an identical provision in its constitution of 1790.³³⁴ Massachusetts and New Hampshire, which maintained Congregational establishments well into the nineteenth century, guaranteed equal protection of the law for Christian denominations and provided that "no subordination of any one sect or denomination to another shall ever be established by law."³³⁵ When Congregationalism was disestablished in Connecticut in 1818, the state included a provision in its first constitution that read: "No preference shall be given by law to any Christian sect or mode of worship."³³⁶

The theme of equal treatment also recurs in the writings of the Founders, particularly in those of Madison among the Enlightenment separationists, and Backus among the pietistic separationists. In the

³³⁰ 1 ELLIOT'S DEBATES, *supra* note 74, at 328 (July 26, 1788).

³³¹ See *id.* at 334 (May 29, 1790).

³³² DEL. CONST. of 1776, art. 29, in 1 THORPE, *supra* note 18, at 567.

³³³ See GA. CONST. of 1798, art. IV, § 10, in 2 THORPE, *supra* note 18, at 801; N.J. CONST. of 1776, art. XIX, in 5 THORPE, *supra* note 18, at 2597; N.C. CONST. of 1776, Form of Government, art. XXXIV, in 5 THORPE, *supra* note 18, at 2793; PA. CONST. of 1790, art. IX, § 3, in 5 THORPE, *supra* note 18, at 3100 (wording provision in the plural, "no preference shall ever be given, by law, to any religious establishments or modes of worship."). The first Constitution of Kentucky included a bill of rights drafted by Jefferson that contained a no-preference provision virtually identical to Pennsylvania's 1790 provision. See KY. CONST. of 1792, art. XII, § 3, in 3 THORPE, *supra* note 18, at 1274.

³³⁴ N.Y. CONST. of 1777, art. XXXVIII, in 5 THORPE, *supra* note 18, at 2637; S.C. CONST. of 1790, art. VIII, § 1, in 6 THORPE, *supra* note 18, at 3264.

³³⁵ MASS. CONST. of 1780, pt. I (Declaration of Rights), art. III, in 3 THORPE, *supra* note 18, at 1890; N.H. CONST. of 1784, pt. I (Bill of Rights), art. VI, in 4 THORPE, *supra* note 18, at 2454 (adding a comma after the word "another").

³³⁶ CONN. CONST. of 1818, art. I, (Declaration of Rights), § 4, in 1 THORPE, *supra* note 18, at 537.

Memorial and Remonstrance, Madison opposed the Assessment Bill because it violated "that equality which ought to be the basis of every law," elaborating later in the document: "[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 his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."³³⁷ In *An Appeal to the Public for Religious Liberty*, Backus opposed Massachusetts' tax exemption system for religious dissenters because it "implied an acknowledgement that the civil power has a right to set one religious sect up above another."³³⁸ He condemned "coercive measures about religion," which occur "when temporal advantages are annexed to one persuasion and disadvantages laid upon another," concluding: "But where each person and each [religious] society are equally protected from being injured by others, all enjoying equal liberty to attend and support the worship which they believe is right, . . . how happy are its effects in civil society?"³³⁹

In light of the historical record, the Court correctly observed that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."³⁴⁰ Influenced by strict separationist dicta in early opinions, however, the Court has gone further by asserting that neutrality proscribes not only governmental preference among religions, but also every form of non-discriminatory "aid" to religion in general.³⁴¹ This expansive view of neutrality has proven controversial. While scholars appear to agree that the establishment clause prohibits preferential treatment for a religion, they sharply disagree over whether it also proscribes nonpreferential aid to religion.³⁴²

The debate may well turn on how one defines forbidden "aid"

³³⁷ Madison, *Memorial and Remonstrance*, *supra* note 59, paras. 4 & 8, at 300, 302.

³³⁸ I. BACKUS, *AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY*, *supra* note 142, at 333.

³³⁹ *Id.* at 335.

³⁴⁰ *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Gillette v. United States*, 401 U.S. 437, 449 (1971) ("An attack founded on disparate treatment of 'religious' claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion.").

³⁴¹ *See, e.g., Gillette*, 401 U.S. at 450 ("[T]he Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." (emphasis added)); *see also Abington School Dist. v. Schempp*, 374 U.S. 203, 216 (1963) (confirming view advanced in *Everson* that government may not aid religion in general).

³⁴² *See supra* note 88 (discussing the nonpreferentialist thesis).

and, at any rate, may be directed at the wrong issue. A broad definition that would preclude accommodation of religion, whether involving public funds³⁴³ or other forms of governmental solicitude for religious practice, finds little support in American history. There is no evidence, for example, that when the Founders accommodated Quakerism and other minority sects in the areas of loyalty oaths and conscientious objection, they believed they were impermissibly "aiding" religion or "preferring" such sects over other religions. Indeed, some of the early state constitutions that prohibited governmental preference for one religion over others also granted loyalty oath and conscientious objector accommodations. Properly understood, these accommodations show a sensitivity to the core value of religious liberty and, in a sense, may reflect a concern to place all religious groups on an equal footing in terms of the interaction of civil obligation and religious conviction. Thus, Quakers could fulfill their civil duty of declaring loyalty without compromising their convictions, thereby placing them on the same level as adherents of religious groups not opposed to taking oaths.

In any case, the debate over nonpreferential aid may be cast in incorrect terms because it focuses on the issue of "no-aid" rather than on that of "coercion." Even assuming that Madison's *Memorial and Remonstrance* occupies a preferred place in interpreting the religion clauses, separationists and most in the strict neutrality camp have mistakenly invoked the document to support the proposition that government cannot give even "three pence" to religion.³⁴⁴ This interpretation

³⁴³ *Sherbert v. Verner*, 374 U.S. 398 (1963), and its progeny held that under the free exercise clause, South Carolina and other states had to give public funds to Mrs. Sherbert and those similarly situated precisely because of their religious convictions. See *supra* note 190 (discussing *Sherbert* and subsequent unemployment compensation cases).

³⁴⁴ The authors suspect that this misplaced focus on "no-aid" resulted, at least in part, because of fears in the 1940s and 1950s that the legislatures would provide support to Roman Catholic schools. Conservative Protestants and secularists expressed this fear, often in vehemently anti-Catholic terms, in numerous works. See, e.g., P. BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* 54-78 (1949) (intemperate work by a Protestant minister interpreting strict separation primarily in terms of prohibiting state aid to Catholic education); J. DAWSON, *SEPARATE CHURCH AND STATE NOW* 52-53 (1948) (work by a Baptist minister and co-founder of Protestants and Other Americans United for Separation of Church and State expressing the view that *Everson* was wrongly decided and that the Catholic Church poses the most serious threat to separation); C. MOEHLMAN, *THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* at xiii (1951) (work by a Protestant Professor of Church History defending strict separation against Catholic attacks and asserting that the Catholic tradition is "antithetical" to the American tradition of church and state); V. THAYER, *RELIGION IN PUBLIC EDUCATION* (1947) (work by an adherent of Ethical Culture glorifying the secular school and vigorously opposing inclusion of religion in public education). Justice Rutledge's dissent in *Everson*, largely a product of this era, reflects the misplaced emphasis on "no-aid." See *Everson v. Board of Educ.*, 330 U.S. 1, 31-32 (1947) (Rut-

tears the *Memorial and Remonstrance* from a consistent understanding in American history that the central feature of an establishment was governmental coercion of conscience.³⁴⁵ Madison's "three pence" argument not only reflects, but directly supports, this understanding: "Who does not see . . . that the same authority which can *force* a citizen to contribute three pence only of his property for the support of any one establishment, may *force* him to *conform* to any other establishment in all cases whatsoever?"³⁴⁶ This passage, coupled with the *Memorial and Remonstrance's* other references to coercion and voluntarism,³⁴⁷ demonstrates that Madison regarded the Assessment Bill as an impermissible establishment not because public funds would go to religion, but because the secular "arm" would use its coercive power to compel citizens to contribute to religion.

The element of coercion not only provides a unifying thread to Madison's views on church and state,³⁴⁸ it largely accounts for the numerous practices of the Founders recognizing the importance of religion to the republic.³⁴⁹ These practices are a source of embarrassment to separationists, who are required to advance the untenable thesis that, shortly after enacting an establishment clause intended broadly to proscribe federal aid to religion and religious involvement in society, the

ledge, J., dissenting).

³⁴⁵ See *supra* notes 250-64 and accompanying text.

³⁴⁶ Madison, *Memorial and Remonstrance*, *supra* note 59, para. 3, at 300 (emphasis added).

³⁴⁷ See *id.* para. 1, at 299 (quoting article 16 of the Virginia Declaration of Rights in objecting to governmental use of "force and violence" to direct religious conviction); *id.* para. 4, at 300 (referring to the belief of "Quakers and Menonists" that "compulsive support" of their religions was unnecessary); *id.* para. 7, at 301 (commending the Church prior to Constantine because religious teachers "depended on the voluntary rewards of their flocks"); *id.* para. 9, at 302 (asserting that the "proposed establishment" degrades some citizens "whose opinions in Religion do not bend to those of the Legislative authority"); *id.* para. 11, at 302 (condemning governmental attempts "to extinguish Religious discord, by proscribing all difference in Religious opinion"); *id.* para. 13, at 303 (asserting the ineffectual nature of "attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of the Citizens"); *id.* para. 14, at 303 (arguing that a measure of such "singular magnitude and delicacy ought not to be imposed").

³⁴⁸ Madison's views on church and state as a younger statesman and Framers of the religion clauses are best understood in light of federalism, the centrality of coercion, and a recognition that in many respects he stood between the Enlightenment and pietistic separationists. In his retirement, Madison rejected some of his earlier views and extended others. See *supra* notes 115-23 and accompanying text.

³⁴⁹ See *supra* notes 237-43 and accompanying text. The authors are not suggesting that all of these practices would pass constitutional muster either in the founding generation or today, but merely that, taken as a whole, they demonstrate that the Founders had a far more intrusive understanding of establishment than do modern separationists.

Founders, for whatever reasons, violated it in countless ways.³⁵⁰ When faced with a hermeneutical approach that fails to elucidate the historical meaning of a text, the solution is not to distort the text or denigrate its history, but to abandon the approach. In short, the Framers intended the establishment clause to forbid discriminatory aid among religions and those forms of nondiscriminatory aid to religion that exert a coercive influence on religious choice; they did not intend the clause broadly to proscribe aid to religion *per se*.³⁵¹ Affording evenhanded and noncoercive aid in a religiously pluralistic society may be a difficult and sensitive task, but that has to do with the principle's implementation, not with its historical soundness.

The Court's second proposition, that government maintain neutrality between "religion and nonreligion," is problematic from the standpoint of history and semantics. First, the principal, if not exclusive, emphasis on government neutrality in the colonial and early republican periods was government action that favored one or more religions over all others; one encounters little stress on comparing religious rights to practices or beliefs that are not religious. One leaves the historical record impressed, however, with the sacrifices made and the creative energy expended on behalf of religious freedom by individuals such as the Lords Baltimore, Williams, Clarke, Penn, and Backus and by colonial Catholics, Jews, Quakers, Baptists, and other dissenters. Religious conviction and a desire for religious freedom drove these people like few secular forces would. The issue of church and state thus posed a unique problem deserving special attention. The Founders responded by specifically protecting religion in the first state constitutions and in the first amendment, thereby according religious practice and belief a status not accorded to secular activities.

A second difficulty arises in the Court's use of the term "nonreligion," which literally means "that which is not religion" or the absence of religion.³⁵² A neutrality between religion and "everything that is not

³⁵⁰ Justice Brennan offered a variation of this thesis in his dissent in *Marsh v. Chambers*, 463 U.S. 783 (1983). In rejecting the Court's reliance on history in sustaining legislative chaplains, he labeled as "questionable" the majority's assumption "that the Framers of the Establishment Clause would not have themselves authorized a practice that they thought violated the guarantees contained in the Clause." *Id.* at 814 (Brennan, J., dissenting). Justice Brennan's argument might have credence if Congress had appointed chaplains years after ratification of the first amendment, but it borders on absurdity in view of the fact that the First Congress appointed paid chaplains just days before arriving at the final wording of the Bill of Rights.

³⁵¹ See *supra* note 263 and accompanying text.

³⁵² See McConnell, *supra* note 170, at 8-13 (discussing the various meanings of strict neutrality between religion and nonreligion); Paulsen, *supra* note 162, at 332-34 (criticizing the Court's use of the term "nonreligion").

religion" defies definition and leads to nonsensical results, because it rests on a comparative world that knows no bounds. Countless human activities, such as golf, carpentry, driving, eating, sleeping, and hiking, to name a few, fall into the category of "nonreligion." But it does not follow that government must be neutral between such activities and those motivated by religion. Although a dedicated adherent to strict neutrality might answer "yes," our heritage of religious liberty and the presence of the religion clauses in the first amendment dictate otherwise. The historical principle of accommodation, for example, cannot be explained satisfactorily in terms of strict neutrality, but it makes sense if one recognizes that the protection of voluntary religious expression occupies a special place in the constitutional hierarchy.

The Court's use of "nonreligion" is more properly understood as connoting the right of an individual to believe or not believe in religious matters. This definition not only reduces the neutrality principle's "comparative world," it embodies the central historical concern with governmental coercion of conscience to compel adherence to "orthodox" doctrine. Pietistic separationists, particularly Williams and Penn, affirmed one's right to believe or not believe free from the corrupting hand of government. In condemning the "straining of men's c[o]nsciences by civil power," Williams asserted that "[t]his binding and rebinding of conscience, contrary or without its own persuasion, so weakens and defiles it, that it (as all other faculties) loses its strength, and the very nature of a common honest conscience."³⁵³ The essence of Penn's thought was a belief that a person's "religious life was authentic only when he willingly and spontaneously granted his allegiance to God on the basis of understanding and conviction and without the base motives introduced by coercion."³⁵⁴ While the religion clauses properly encompass a right not to believe and therefore compel neutrality between belief and unbelief, they do not protect actions stemming from secular value systems occasioned by unbelief. The Constitution extends protection only to the free exercise of religion and therefore does not require neutrality between actions premised on religious belief and those premised on moral codes not rooted in religion.³⁵⁵

³⁵³ R. WILLIAMS, *THE BLOODY TENENT YET MORE BLOODY* (London 1652), in 4 WRITINGS OF WILLIAMS, *supra* note 19, at 209 (changed to conform to modern usage; emphasis deleted).

³⁵⁴ M. ENDY, *supra* note 22, at 323.

³⁵⁵ See McConnell, *supra* note 170, at 11 (under the religion clauses, "[t]he protection of religious opinion will equally benefit religion and unbelief; the protection of religious action will primarily benefit religion"). Nonreligious conduct, however, may well find protection under the free speech clause or under the first amendment's "penumbral" right of freedom of thought.

Given the core value of religious liberty, the special status accorded religious exercise by the Founders, and the values underlying accommodation, the Constitution does not compel a strict neutrality that is blind to the religious needs of American citizens. Professor Kurland's much debated "equal protection" interpretation of the religion clauses therefore fails to take adequate account of fundamental historical values. Under his standard, essentially a reformulation of the secular regulation rule,³⁵⁶ the clauses would "be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden."³⁵⁷ His standard, however, ignores the text of the first amendment, which itself uses religion as a standard for governmental "action or inaction." In addition, implementation of Kurland's standard would entail heavy costs to religious liberty, because it rejects explicit accommodations. Instead of a "religion-blind" approach, history supports the *Walz* Court's concept of benevolent neutrality and Professor Katz' view of "neutralizing aids." Recognizing that religious liberty is the core value of the religion clauses, Katz correctly asserts that the neutrality compelled by the establishment clause permits special provisions for religion "designed to counteract or neutralize the restrictions of religious freedom that would otherwise result from government's secular activities."³⁵⁸

F. Summary

The core value of the religion clauses is liberty of conscience in religious matters, an ideal which recurs throughout American history from the colonial period of Roger Williams to the early national period of the Founders. All three traditions of church and state — Enlightenment, pietistic, and political centrist — regarded religious liberty as an

³⁵⁶ See *supra* note 286 and accompanying text. The similarity between Kurland's approach and the secular regulation rule is evident from his assessment of *Reynolds v. United States*, 98 U.S. 145 (1879), which he regards as essentially sound because it followed a religion-blind approach:

[I]f the law is within the scope of governmental authority and of general application, it may—indeed probably must—be applied without regard to the religious convictions of those whose acts constitute wilful violations of that law. To permit individuals to be excused from compliance with the law solely on the basis of religious beliefs is to subject others to punishment for failure to subscribe to those same beliefs.

P. KURLAND, *RELIGION AND THE LAW* 22 (1962) (footnote omitted).

³⁵⁷ *Id.* at 18.

³⁵⁸ Katz, *Radiations From Church Tax Exemption*, *supra* note 172, at 102. The view is developed at length in W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* (1964).

inalienable right encompassing both belief and action and as an essential cornerstone of a free society. The establishment and free exercise clauses are complementary means to attain religious liberty, and are given content by the animating principles of federalism, institutional separation, accommodation, and benevolent neutrality.

In creating a republic premised on civil and religious liberty, yet receptive to religion as a cohesive moral force, the Founders looked largely to prevailing political philosophy and the principle of federalism. Fearful of centralized authority, they sought to preserve religious freedom and other fundamental rights by dividing civil power within the federal government and between the federal and state governments. The religion clauses reflect the concerns of federalism, in particular the Framers' beliefs that a national church posed the greatest danger to religious liberty, that the exercise of civil authority in religious matters should be left to the states, and that the establishment clause prevented congressional infringement of religious liberty, as well as interference with existing state establishments. The Framers also sought to ensure a free society by affording constitutional protection to "mediating" institutions such as the family, churches, the press, business, and voluntary associations. The Court's use of the fourteenth amendment to incorporate the establishment clause created certain historical and conceptual difficulties which can be minimized by recognizing that the clause prohibits only those governmental actions threatening religious liberty in a manner analogous to traditional establishments. The principle of federalism counsels the judiciary to exercise restraint in formulating the role of religion in society, and reinforces the view that mediating institutions are essential to the preservation of civil and religious freedom.

The principle of institutional separation requires neither a secular society, nor the exclusion of religion from the public arena. The Founders, particularly the political centrists, acknowledged that the republic rested largely on moral principles derived from religion. Those who contributed most in the struggle for religious liberty, leaders such as Williams, Clarke, Penn, Jefferson, Madison, and Backus, uniformly regarded governmental coercion of conscience as the essence of religious establishment. The Enlightenment tradition of separation contributed to the meaning of the establishment clause by stressing that state-preferred churches corrupted the civil power and prevented the full achievement of religious liberty. The pietistic separationists campaigned primarily for values that animate the free exercise clause; they worked tirelessly to protect the integrity of religious exercise, both in individual and institutional terms, from governmental interference.

The special status accorded religion by the Founders is manifested

by the principle of accommodation, a free exercise concept which encourages and sometimes compels governmental deference to the religious needs of citizens in a pluralistic society. The constitutional text, the historical growth of religious freedom, the beliefs of the Founders, and the legislative history of the religion clauses compel the conclusion that religion enjoys a special constitutional status in American culture. The principle of accommodation can be traced to the Founders, who manifested a sensitivity to religious practice in the free exercise clause, in the "Oath or Affirmation" requirement in article VI of the Federal Constitution, in state constitutional oath provisions, and in exemptions for conscientious objectors. In a society characterized by expansive governmental power and regulation, accommodation of religion becomes increasingly important as a means for fostering religious liberty.

The animating principle of benevolent neutrality derives specific meaning from the nation's historical commitment to the ideals of equality and voluntarism. Government preference for one religious group over others not only violates the ideal of equality, but undermines the principle that each group should be left to grow or decline on the basis of the voluntary actions of its adherents. While history strongly supports the view that the establishment clause requires governmental neutrality among religions, it provides little evidence for the view that government must maintain strict neutrality between religion and nonreligion. The religion clauses do not compel a neutrality blind to the spiritual needs of citizens. Instead, they promote religious liberty through a benevolent neutrality that permits government to foster a society committed to voluntary religious belief and practice. In the final analysis, the special constitutional status enjoyed by religion rests on a conviction, expressed by Alexis De Tocqueville in 1835, that in America "the spirits of religion and of freedom" are "intimately linked together in joint reign over the same land."³⁵⁹

IV. APPLICATION OF THE ANIMATING PRINCIPLES

Since their incorporation through the fourteenth amendment, the religion clauses have been widely applied, generating numerous cases. On the social landscape, the activities of government have increased dramatically with the rise of the regulatory welfare state, creating myriad points of contact between government and religious organizations and citizens. Recent cases illustrate the increasing interaction of religion and government. Courts have grappled, for example, with such

³⁵⁹ 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295 (1835) (J. Mayer ed. & G. Lawrence trans. 1969) (two vols. in one).

sensitive issues as the scope of the clergy-penitent privilege;³⁶⁰ the permissibility of tort actions against churches for administering discipline or alleged "clergy malpractice";³⁶¹ the assertions of parents that public school textbooks unconstitutionally advance the religion of secular humanism;³⁶² the prosecution of church sanctuary workers for violating immigration laws;³⁶³ and the extent of an employer's statutory obligation to accommodate religion in the work place.³⁶⁴

In resolving contemporary conflicts under the religion clauses, courts should look to the core value of religious liberty and its implementing principles of federalism, institutional separation, accommodation, and benevolent neutrality. These principles, however, should not be construed as constituting a test or formula to be applied woodenly to

³⁶⁰ See *United States v. Dubé*, 820 F.2d 886, 889 (7th Cir. 1987) (holding that a congregation member's discussions with his pastor concerning his income tax difficulties were not covered by the clergy-penitent privilege, at least when the discussions were unrelated to spiritual matters).

³⁶¹ For examples of church discipline or "shunning" cases, see *Paul v. Watchtower Bible and Tract Soc'y of New York, Inc.*, 819 F.2d 875, 876-77 (9th Cir.) (barring a tort action alleging defamation, invasion of privacy, fraud, and outrageous conduct against the Jehovah's Witness Church, which had "shunned" plaintiff, because the Church's action was protected by the free exercise clause), *cert. denied*, 108 S. Ct. 289 (1987); *Rasmussen v. Bennett*, 741 P.2d 755, 758-59 (Mont. 1987) (holding that the first amendment protects churches from judicial interference when they discipline individuals through "disfellowship" or shunning).

The most celebrated "clergy malpractice" case is *Nally v. Grace Community Church of the Valley*, 240 Cal. Rptr. 215, 219 (Ct. App. 1987) (holding that the first amendment does not shield church-related counselors from parents' tort action alleging "negligent failure to prevent [their son's] suicide"), *rev'd on other grounds*, 763 P.2d 948, 954-55, 253 Cal. Rptr. 97, 108-09 (1988) (avoiding the first amendment issue on evidentiary and tort-law grounds); see also *Handley v. Richards*, 518 So. 2d 682 (Ala. 1987) (affirming dismissal for failure to state a cause of action in a clergy malpractice suit alleging outrageous conduct during marital counseling).

³⁶² See *Smith v. Board of School Comm'rs*, 827 F.2d 684, 693-95 (11th Cir. 1987) (reversing a decision that numerous public school textbooks violated the establishment clause by advancing the religion of secular humanism; finding it unnecessary to determine whether secular humanism was a religion because the books did not advance or inhibit any religion); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987) (holding that the free exercise rights of fundamentalist Christian parents were not violated by a public school's failure to accommodate their religious objections to offensive reading materials), *cert. denied*, 108 S. Ct. 1029 (1988).

³⁶³ See *United States v. Merkt*, 794 F.2d 950, 954-57 (5th Cir. 1986) (holding on the basis of *Yoder* that the conviction of church sanctuary workers for violating immigration laws did not violate their free exercise rights because the governmental interest in enforcing immigration laws was compelling, and Christian beliefs did not require involvement in the sanctuary movement), *cert. denied*, 480 U.S. 946 (1987).

³⁶⁴ See *International Ass'n of Machinists, Lodge 751 v. Boeing Co.*, 833 F.2d 165, 168-69 (9th Cir. 1987) (holding that an employee opposed to union membership on religious grounds was entitled under Title VII of the Civil Rights Act to make a charitable contribution in lieu of union dues); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1087-89 (6th Cir. 1987) (holding that the accommodation requirement of Title VII is not satisfied when an employer forces an employee who objects to working on his Sabbath to find a replacement).

current issues. The purpose of the discussion in Part III was not to propose a specific judicial test, but to identify those principles that should govern the revision of existing tests or the formulation of new ones. It should be emphasized as well that the animating principles represent a distillation of historical values that embody the founding generation's ideals concerning church and state more than the specific views of the Founders. In this regard, the state constitutions preceding the Bill of Rights are a critical, although often overlooked, source for understanding the American tradition of church and state. Of course, the corporate actions of the Founders and, to a lesser extent, their personal views, provide important guidance, but they should not be regarded as dispositive. Thus, while the principles endure, their application may differ as society changes.³⁶⁵ To illustrate this proposition, this Article will apply the animating principles to three current issues: "equal access" for student religious groups in public high schools; religious symbols and ceremonies in public life, particularly in light of the concept of "civil religion"; and the constitutional definition of religion.

A. *The Equal Access Controversy*

One of the most volatile religious issues in this decade concerns the right of student religious groups to meet on the same basis as other student groups in public high schools. This "equal access" contro-

³⁶⁵ A common view in the new nation, for example, was that the concept of institutional separation required the exclusion of ministers from sitting in the state legislatures or from holding any political office. See *supra* note 245 and accompanying text. Jefferson initially embraced this view because he regarded the established clergy a threat to America's political experiment: "[t]he clergy, by getting themselves established by law, & ingrafted into the machine of government, have been a very formidable engine against the civil and religious rights of man." Letter from Thomas Jefferson to Jeremiah Moor (Aug. 14, 1800), in 7 THE WRITINGS OF JEFFERSON 455 (P. Ford ed. 1904). Madison, Witherspoon, and others strongly opposed clergy exclusion provisions and, after years of reflection, Jefferson adopted the same view on the ground that the clergy no longer posed a political threat to the republic. See *id.* Whatever its justifications to the founding generation, scholars agree that institutional separation neither requires nor counsels clergy exclusion in today's society. Indeed, when the Court considered a free exercise challenge to a statute implementing Tennessee's constitutional ban against ministers serving in the state legislature, ardent separationists assisted the American Civil Liberties Union in filing an *amicus curiae* brief urging invalidation of the statute. See *McDaniel v. Paty*, 435 U.S. 618, 620 n.* (1978).

In addition, since modern America poses situations unforeseen by the Founders, the animating principles necessarily must be extended to meet these new challenges. In this regard, the emergence of widespread public education, the rise of the regulatory welfare state, and the proliferation of religious groups present a cultural milieu quite different from that of 1789. Specific historical practices and views become less analogous, and therefore less helpful, but the importance of fundamental principles derived from history endures.

versy³⁶⁶ arises in the much broader context of the role that public education has played in American culture. With the emergence of compulsory education in the mid-nineteenth century, a function traditionally performed by parents and private religious and nonreligious schools was entrusted largely to the state. The public school proved to be a critical institution for inculcating and maintaining democratic ideals; during successive waves of immigration, it performed the task of assimilating diverse peoples into our society.

Whether or not one agrees with this role, the fact remains that public schools historically have transmitted values, not merely knowledge, and increasingly have been called on to prepare children for productive involvement in society. Given the value-laden nature of public education and the enormous amount of time it consumes in the lives of children, it is understandable that parents and religious organizations have expressed concern over such matters as the place of objective instruction about religion in the curriculum, the character of school employees, the values and manners taught, the content of textbooks, and the activities sponsored. Some parents recently have alleged, for example, that the public school curriculum and modern textbooks contain few references to the historical influence of religion and that public education is impermissibly advancing the religion of secular humanism.³⁶⁷ The first allegation receives significant support from educators and other professionals,³⁶⁸ who attribute the exclusion primarily to a fear that materials on religion will provoke controversy and breach the wall between church and state. Thus, the wall metaphor not only has

³⁶⁶ For a thoughtful defense of the "equal access" rights of student religious groups, see Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 9-57 (1986). Applying a strict neutrality standard, Professor Laycock concludes that the free speech and free exercise clauses require a right of equal access for religious speech. Because the authors believe that the Constitution compels "benevolent" rather than "strict" neutrality, we arrive at the same conclusion, but on the basis of somewhat different premises.

³⁶⁷ See *supra* note 362 and accompanying text. For articles asserting that there is impermissible governmental advancement of the "religion" of secular humanism, see Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POL'Y 125, 177-80, 182-83 (1979); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1, 15-24 (1978).

³⁶⁸ See PANEL ON RELIGION IN THE CURRICULUM, ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, RELIGION IN THE CURRICULUM 7-8 (1987) (finding that "references to religion have been all but excised from the public school curriculum," in large part because of educators' concern over breaching Jefferson's wall and exaggerated fears of controversy); P. VITZ, CENSORSHIP: EVIDENCE OF BIAS IN OUR CHILDREN'S TEXTBOOKS 56 (1986) (concluding on the basis of a detailed investigation of eight major American history textbooks used in the eleventh and twelfth grades that not one "acknowledges, much less emphasizes, the great religious energy and creativity of the United States").

generated confusing judicial precedent, it has exerted a chilling effect on educational efforts to present knowledge in a balanced and accurate manner; it has transformed the Pilgrims from religious dissenters into international travelers.

If these assessments are correct, then Justice Goldberg may well have been prophetic when he warned in 1963 that an "untutored devotion to the concept of neutrality" in religious matters could lead to a "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."³⁶⁹ In this regard, Dr. Charles Malik, distinguished Lebanese educator and former President of the United Nations, concluded in 1980 that the "enormity of what is happening is beyond words."³⁷⁰ What can the church and family do, he asked, "if the children spend between fifteen and twenty years of their life, and indeed the most formative period of their life, in school and college in an atmosphere of formal denial of any relevance of God and spirit and soul and faith to the formation of their mind?"³⁷¹ To the extent it holds the rudder that steers children morally and socially, public education exercises, in the words of John Stuart Mill, a dangerous power to mold "people to be exactly like one another."³⁷² To prevent such an outcome, he proposed a system of competing state and private schools that would give objective examinations on essential areas of knowledge, including religion. While the state should not "bias the conclusions of its citizens," he concluded that it properly could examine a student, even an atheist, on religious matters "provided he is not required to profess a belief in them."³⁷³

The value-laden role of public education, the task of presenting knowledge in a responsible and accurate manner, and recent concerns regarding the exclusion of religion from the curriculum lead to a question that undergirds the equal access controversy and virtually every other legal issue involving religion and public education: is the public school a fundamentally "secular" institution? If by secular one means that the public school may not inculcate and propagate religious beliefs, then it properly may be understood as a secular institution. From all indications, however, this is not the understanding of secular one encounters today. Instead, the untutored understanding is that secular means the absence of all things religious, so that public schools should

³⁶⁹ *Abington School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

³⁷⁰ C. MALIK, *THE TWO TASKS* 27 (1980).

³⁷¹ *Id.*

³⁷² J.S. MILL, *supra* note 230, at 98.

³⁷³ *Id.* at 99.

excise all references, objective or otherwise, to religion. If used in this sense, the public school should not be regarded as a secular institution. To assert otherwise would place educators in the difficult position of providing a complete and balanced education without referring to one of the most dynamic forces in mankind's history.³⁷⁴

In light of the confusion engendered by the term "secular," it perhaps would be more appropriate to view the public school as a pluralistic institution dedicated to neutrality in religious matters. Achieving this neutrality in a society characterized by a high degree of pluralism constitutes an enormous challenge, one which increases the growing number of cases involving religion and public education. With the erosion of the broad moral consensus of prior generations, public schools can no longer appeal to particular premises for morality, but must think in terms of presenting various value systems in a balanced manner. A key question becomes whether or not religious perspectives can be included in this endeavor on equal terms with nonreligious views and influences. Recent cases offer one answer; history and tradition afford another.

When the federal courts first considered the "equal access" issue, they uniformly answered "no" to the above question.³⁷⁵ Armed with a judicial heritage of strict separation, they rejected the contention that the free exercise and free speech clauses compel public schools to treat student religious groups the same as other groups.³⁷⁶ Indeed, the courts

³⁷⁴ As Justice Jackson stated in *McCollum v. Board of Educ.*, 333 U.S. 203 (1948), an attempt to extirpate the objective study of religion from the public schools is neither constitutionally compelled nor educationally wise: "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view." *Id.* at 236 (Jackson, J., concurring). See generally C. COX, *THE FOURTH R: WHAT CAN BE TAUGHT ABOUT RELIGION IN THE PUBLIC SCHOOLS* 125-26, 165-69 (1969) (concluding that there is a need for educationally sound materials about religion, better training of teachers to present materials in a thoughtful manner, and expert supervision of teachers to insure objectivity).

³⁷⁵ See *Brandon v. Board of Educ.*, 635 F.2d 971, 977-79 (2d Cir. 1980) (rejecting students' free exercise claim that the school board must allow them to meet before classes and finding in the alternative that the establishment clause would compel exclusion of religious groups from the school), *cert. denied*, 454 U.S. 1123 (1981); *infra* notes 379-86 and accompanying text (discussing *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986)); see also *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1044-46 (5th Cir. 1982) (holding on the basis of *Brandon* that a school board policy permitting students to meet voluntarily at school before or after regular hours for any "educational, moral, religious or ethical purposes" violates the establishment clause), *cert. denied*, 459 U.S. 1155 (1983).

³⁷⁶ Some commentators have asserted on the basis of *Widmar v. Vincent*, 454 U.S. 263 (1981), that equal access for student religious groups in public high schools is required by the free speech clause. See, e.g., Laycock, *supra* note 366. While the authors share this view, detailed analysis of the equal access issue under the free speech clause is beyond the scope of this Article. For a brief discussion of *Widmar*, see *supra*

reasoned that even if school boards wanted to treat religious groups equally, they could not do so because the establishment clause prohibited such an "endorsement" of religion. Prompted by such cases and a conviction that discrimination against student religious speech was widespread, Congress enacted the Equal Access Act in 1984 by an overwhelming margin.³⁷⁷ In an effort to end such discrimination, the Act prohibits a public high school with a forum for noncurriculum student groups "to deny equal access" to this forum to groups desiring to meet for "religious, political, philosophical, or other [speech purposes]."³⁷⁸

The equal access controversy is illustrated by *Bender v. Williamsport Area School District*,³⁷⁹ initiated before passage of the Equal Access Act. In *Bender*, a student religious group called "Petros" sought permission to meet during the regularly scheduled activity period of a public high school. During this period, pupils were free to participate in student clubs or to pursue personal interests on the school premises. Over forty groups had been allowed to meet through the years, including Student Government, Band, and the Chess, Poetry, Audubon, Photography, Speech, Drama, and Ski Clubs.³⁸⁰ Although no other request to organize a club had ever been denied, the school board rejected Petros' application because it concluded that religious activities on the school premises would violate the establishment clause.

Members of Petros filed suit, alleging that the school board had violated their rights under the free speech and free exercise clauses. The district court found against the students on the free exercise claim, but sustained their free speech claim. Finding that the activity period constituted an open forum, the court held that the school board had impermissibly excluded the religious club because of the content of its speech. It rejected the argument that the establishment clause justified such content-based discrimination and ordered the school to permit Petros to meet.

A divided court of appeals reversed. The court conceded that the school had created a "limited forum" and that the free speech clause afforded protection to the members of Petros. The majority found, however, that the students' free speech rights were outweighed by establishment clause interests, particularly the prohibition against endorsement:

note 191.

³⁷⁷ The Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302 (codified at 20 U.S.C. §§ 4071-74 (Supp. IV 1986)). The Act and its legislative history are considered in Laycock, *supra* note 366, at 4-5, 35-45.

³⁷⁸ The Equal Access Act § 4071(a).

³⁷⁹ 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986).

³⁸⁰ See *id.* at 543 n.8; *id.* at 565 n.5 (Adams, J., dissenting).

"the presence of religious groups within the school during the curricular day has the effect of advancing religion, in that it communicates a message of government endorsement of such activity."³⁸¹ Adopting the view that religion is a "private" matter, the court stressed that "prayer in the public schools segregates students along religious lines."³⁸²

Emphasizing the critical difference between voluntary and state-sponsored religious activity, the dissent criticized the majority's endorsement approach and asserted that the student body was far more likely to read the selective exclusion of Petros as "a manifestation of official hostility towards religion."³⁸³ Nor did the establishment clause justify the school board's content-based discrimination against the speech of Petros' members. Relying on the Supreme Court's decision in *Widmar v. Vincent*,³⁸⁴ which held that the free speech clause compelled the University of Missouri to permit a student religious group to meet on campus, the dissent reasoned that the difference between the maturity of high school and college students was insufficient to justify a distinction of constitutional import.

The Supreme Court vacated the court of appeals' judgment on standing grounds, thereby reinstating the district court's decision recognizing the right of Petros to meet. Four justices dissented on the standing issue and would have reached the merits. Chief Justice Burger, joined by Justices White and Rehnquist, emphasized that the establishment clause mandates "state neutrality, not hostility, toward religion" and concluded that granting equal access to Petros was "wholly consistent with the Constitution."³⁸⁵ Justice Powell largely agreed with the Chief Justice, but wrote separately to state that the case was controlled on the merits by *Widmar*.³⁸⁶

The Court's failure to resolve this volatile issue, coupled with enactment of the Equal Access Act, portends continued litigation. This litigation largely could have been avoided, because the equal access controversy and the resulting tension between constitutional values—establishment interests versus free exercise and free speech interests—is a dilemma of the judiciary's own making. Proceeding from a

³⁸¹ *Id.* at 555.

³⁸² *Id.* at 561.

³⁸³ *Id.* at 565 (Adams, J., dissenting). Judge Adams is one of the authors of this Article.

³⁸⁴ 454 U.S. 263 (1981).

³⁸⁵ *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 554-55 (1986) (Burger, C.J., dissenting).

³⁸⁶ *See id.* at 555 (Powell, J., dissenting). He stated: "I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*." *Id.* at 556 (Powell, J., dissenting).

strict separation position and the corollaries of "privatized" religion and a secular society, the courts that ruled on equal access viewed religious expression suspiciously and employed the establishment clause as a means of excluding such expression from the public schools. If the courts had proceeded under the animating principles enumerated in Part III, they would have recognized that the establishment clause is a co-guarantor of religious liberty, not a bludgeon to defeat other constitutional rights. Properly framed, the issue becomes whether equal access for student religious groups advances religious liberty, the core value of the religion clauses. A related question follows: Does the selective exclusion of such groups violate this core value? Understood in light of its implementing principles of federalism, institutional separation, accommodation, and benevolent neutrality, religious liberty not only permits, but requires equal access for student religious groups.

Principles of federalism counsel that the judiciary should interfere with mediating structures only when important constitutional values are clearly at stake. The public high school is a mediating institution that performs a task of the highest order—educating and preparing children for productive involvement in a democratic society. When high schools selectively exclude influences such as religion, however, it becomes necessary for the courts to intervene. The justification for intervention gains greater credence in light of the Equal Access Act, which constitutes Congress' considered judgment that widespread discrimination against religion has occurred in public education. Passage of the Act by a wide margin sends a clear signal that the legislative branch desires student religious groups to be treated on the same basis as other student groups.

The principal error of the court of appeals in *Bender*, pointed out by the dissent, arose because of its adherence to strict rather than institutional separation. Viewing religious influences as a divisive rather than a healthy manifestation of pluralism, the majority failed to grasp a critical distinction in applying the concept of governmental endorsement of religion—the difference between governmental and private speech. The identity of the speaker, not the location of the speech, should be the focus of the inquiry. No reasonable constitutional objection, for example, could be made against a Jewish student sharing a religious experience as part of a public school exercise. No reasonable school employee, parent, or student would conclude that the state "symbolically" endorses this student's views simply because the speech takes place in a public school. In the same setting, however, serious establishment clause concerns would arise if a public school teacher used a classroom as a forum for sharing her religious views. The student groups in

Bender are analogous to the former example; they clearly were engaged in private speech in a context in which not even an appearance of endorsement is present. To assert otherwise leads to the dubious proposition that the school board implicitly endorses all speech that occurs during the activity period, including that of the Student Government, Band, and Ski Club, as well as that of Petros.³⁸⁷

Interpreting the establishment clause in terms of the historical element of coercion, it becomes plain that allowing Petros to meet along with other student groups does not violate institutional separation. No impermissible alliance between the school board and religion exists which threatens to coerce or influence the voluntary formation of religious belief. Students initiate and operate the various clubs with little or no assistance from school officials. During the activity period, they may choose to attend any one of the numerous clubs or pursue personal interests on their own. No concern arises under the pietistic tradition of separation because the school board, from all indications, would interfere with Petros only if the club creates a disturbance. In any case, it is unlikely that such interference would entangle the school board with the religious views of Petros and its members.

Allowing Petros to meet would accord with the Founders' solicitude for voluntary religious expression and promote the free exercise values underlying the principle of accommodation, particularly in light of the enormous amount of time that compulsory education occupies in the lives of children. During the school year, most children between the formative ages of five and sixteen spend about one-third of their waking hours in public schools. Given that many schools have discriminated against religious speech, it is understandable that some parents are quite concerned and expect the accommodation of voluntary religious expression in the school setting.

Under the accommodation principle, equal access is at least constitutionally permissible and, in terms of educational policy, is commendable from the standpoint of free exercise values. Under the principle of benevolent neutrality, equal access is not only constitutionally permissible, but compelled. The selective exclusion of religious groups clearly violates strict neutrality for, under Kurland's "religion-blind" view, it uses religion as a classification for determining governmental action and, under the view of other scholars, such as Professor Laycock, it

³⁸⁷ See, e.g., *O'Hair v. Andrus*, 613 F.2d 931, 934-35 (D.C. Cir. 1979) (rejecting an establishment clause challenge to the Pope's use of the National Mall to celebrate an outdoor Mass on the ground that any "meaningful perception" of an endorsement of religion was eliminated because the mall was "openly available" to all speakers and groups).

treats religious speech differently than other private speech.³⁸⁸ With respect to religion, however, the Constitution demands not strict, but benevolent neutrality. It was precisely because voluntary religious expression needed and deserved special protection that the Founders granted it a status not given to other expression. To hold that the religion clauses allow or require discrimination against religion turns the first amendment on its head.

Refusing Petros permission to meet, while granting it to all other groups, constitutes official hostility towards religion in violation of benevolent neutrality. What message does such selective exclusion *by the state* send to high school students? The message sent is that religious matters are somehow less worthy of consideration than chess, drama, art, skiing, and home economics. The message that public schools should send, given this nation's historical tradition of religious liberty, is that religion plays an integral part in the lives of many students. The animating principles of the religion clauses, particularly in a compulsory setting like the public schools, strongly support Petros' right to meet on the same basis as other student groups.

Finally, equal access teaches students the valuable civic lesson of toleration towards the beliefs and practices of others. As the dissent pointed out in *Bender*: "Our country's continued progress in [avoiding religious strife] ultimately depends on the individual citizen's tolerance and respect for religious diversity. When the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, I believe the Constitution and the Nation are the better for it."³⁸⁹

B. *Religious Symbolism in Public Life*

The influence exerted by religion in the development of American culture and institutions manifests itself in the contemporary religious symbolism that pervades our society. Communities throughout the nation have recognized this influence in monuments, murals, seals, names, and ceremonies. Public parks contain statutes commemorating Roger Williams, Isaac Backus, Anne Hutchinson, Lord Baltimore, and Martin Luther King, Jr.; city halls and courthouses display monuments inscribed with the Ten Commandments; public buildings are etched with Biblical verses; and public funds are expended to restore famous reli-

³⁸⁸ For a discussion of Kurland's "religion-blind" approach, see *supra* notes 356-57 and accompanying text. Laycock sets forth his position in Laycock, *supra* note 366. If the reasoning in *Widmar* applies at the high school level, then the free speech clause would also compel equal access for student religious groups.

³⁸⁹ *Bender*, 741 F.2d at 570 (Adams, J., dissenting).

gious landmarks, erect crosses as "war memorials," and provide grave monuments with religious symbols for veterans. Our cities bear names such as St. Paul, St. Augustine, Zion, Corpus Christi, and San Francisco, and their boards and councils often open sessions with invocations. Perhaps most symbolic in terms of the judiciary is the relief of "Moses the Lawgiver" above the Supreme Court's bench.

Religious symbols in American society are not, as the secular philosopher Sidney Hook contends, "vestigial remains of a once strongly religious culture."³⁹⁰ Even though confronted with competing ideologies such as materialism, hedonism, and moral relativism, religion remains an indispensable and vital force in the lives of many citizens. What De Tocqueville observed over a century and a half ago with respect to Christianity in America is true today with respect to religion: "Christianity and liberty are so completely mingled that it is almost impossible to get [Americans] to conceive of the one without the other; it is not a question with them of sterile beliefs bequeathed by the past and vegetating rather than living in the depths of the soul."³⁹¹

American culture can thus be seen as a tapestry or woven fabric, with religion as its warp threads. According to anthropologist Clifford Geertz, cultural and religious symbols synthesize "what is known about the way the world is, the quality of the emotional life it supports, and the way one ought to behave while in it."³⁹² Symbols identify "fact with value at the most fundamental level, [giving] what is otherwise merely actual, a comprehensive normative import."³⁹³ Symbols are essential and universal among cultures:

The number of such synthesizing symbols is limited in any culture, and though in theory we might think that a people could construct a wholly autonomous value system independent of any metaphysical referent, an ethics without ontology, we do not in fact seem to have found such a people. The tendency to synthesize world view and ethos at some level, if not logically necessary, is at least empirically coercive; if it is

³⁹⁰ S. HOOK, *RELIGION IN A FREE SOCIETY* 87 (1967). In *Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980), the court adopted an attitude similar to Hook's, reasoning that historical references to the Deity in public life should be treated as "grandfathered" exceptions to establishment clause doctrine because they have little "entangling theological significance" and can "safely occupy their own small, unexpandable niche." *Id.* at 1023 n.2. The difficulty with this approach is that it fails to recognize religion's dynamic character, relegating it instead to a stagnant historical role.

³⁹¹ 1 A. DE TOCQUEVILLE, *supra* note 359, at 293.

³⁹² C. GEERTZ, *Ethos, World View, and the Analysis of Sacred Symbols*, in *THE INTERPRETATION OF CULTURES* 126, 127 (1973).

³⁹³ *Id.*

not philosophically justified, it is at least pragmatically universal.³⁹⁴

Theologian Paul Tillich contended that, "Religion as ultimate concern is the meaning-giving substance of culture, and culture is the totality of forms in which the basic concern of religion expresses itself."³⁹⁵ In brief, this means that "religion is the substance of culture, culture is the form of religion."³⁹⁶ If these scholars are correct, then to eradicate religious symbols from public life would tear at the fabric of our cultural tapestry.

The analysis of these scholars suggests that when the judiciary considers constitutional challenges to religious symbols, it should proceed cautiously, recognizing the broader cultural role of symbolism. In contrast to the numerous secular symbols occupying our attention, religious symbols perform unique functions: teaching historical values and traditions, providing social cohesion at a fundamental level, and reminding us that there are transcendent values and moral standards higher than the state. To remove religious symbols from public life would change radically the substance of American culture. This may or may not be a valid goal, but in a democratic society such a change must be wrought by the people, not compelled by one branch of government. That, at least, is the lesson that the principle of federalism would teach.

The Supreme Court recognized the importance of public religious ceremonies in *Marsh v. Chambers*,³⁹⁷ when it eschewed its much criticized establishment clause test and sustained legislative prayers and chaplaincies on the basis of a long history dating to the Framers. The decision was correct in its conclusion that history provides a compelling basis for sustaining such practices and in its underlying premise that the Framers had a far more intrusive kind of religious sponsorship in mind when they provided for nonestablishment. While legislative chaplaincies are constitutional in principle, however, the particular chaplaincy considered in *Marsh* may have violated the establishment clause because it impermissibly favored one religion over others, thereby failing the standard of benevolent neutrality.³⁹⁸

³⁹⁴ *Id.*

³⁹⁵ P. TILICH, *THEOLOGY OF CULTURE* 42 (1959). The Supreme Court used Tillich's definition of religion as "ultimate concern" in *United States v. Seeger*, 380 U.S. 163, 187 (1965). For the view that political process and religious world view are inextricably connected, see D. PRICE, *AMERICA'S UNWRITTEN CONSTITUTION: SCIENCE, RELIGION, AND POLITICAL RESPONSIBILITY* (1985).

³⁹⁶ P. TILICH, *supra* note 395, at 42.

³⁹⁷ 463 U.S. 783 (1983).

³⁹⁸ As Justice Stevens asserted in dissent: "it seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state

More recently, in *Stein v. Plainwell Community Schools*,³⁹⁹ a federal court of appeals considered the constitutionality of including prayers in high school commencement ceremonies. The court posed the question: "[W]hat kind of invocations and benedictions, if any, does the Establishment Clause of the First Amendment permit the public schools to conduct at their annual commencement exercises?"⁴⁰⁰ The plaintiffs, parents of school children, challenged the inclusion of prayers in the commencement ceremonies of two Michigan high schools. They argued that the prayers "invoke[d] the image of a God or Supreme Being" and thus violated the first amendment values of "liberty of conscience, state neutrality and noninterference with religion."⁴⁰¹ Attendance at the commencement ceremonies was voluntary, and failure to attend did not affect the receipt of a diploma. Students ran the ceremonies; in one school they delivered the prayers themselves, at the other they selected various local ministers to pray.

Judge Merritt concluded in his majority opinion that the religion clauses, taken together, guarantee "equal liberty of conscience," erecting "a neutral state designed to foster the most extensive liberty of conscience compatible with a similar or equal liberty for others."⁴⁰² Treating benedictions and invocations as analogous to legislative prayers, the court concluded that *Marsh* governed the case, permitting some accommodation to the nation's religious traditions. According to the court, *Marsh* required public prayers to be framed in terms of "the American civil religion":

So long as the invocation or benediction on these public occasions does not go beyond "the American civil religion," so long as it preserves the substance of the principle of equal liberty of conscience, no violation of the Establishment Clause occurs under the reasoning of *Marsh*.⁴⁰³

In sustaining commencement prayers, the court emphasized that, unlike classroom prayer, they presented little danger of religious coercion or indoctrination.

The court upheld the practice of commencement invocations and benedictions, but found the prayers in question unacceptable because

legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the First Amendment." *Id.* at 823 (Stevens, J., dissenting).

³⁹⁹ 822 F.2d 1406 (6th Cir. 1987).

⁴⁰⁰ *Id.* at 1407.

⁴⁰¹ *Id.* at 1408.

⁴⁰² *Id.*

⁴⁰³ *Id.* at 1409 (footnote omitted).

they were so overtly Christian that they connoted a symbolic governmental endorsement of Christianity. Thus, the prayers failed to qualify as permissible "civil" invocations and benedictions, as described in *Marsh*. In short, the court sustained the practice of a commencement prayer, but invalidated the prayers in question as too religious to qualify under the concept of American civil religion.⁴⁰⁴

In a long dissent, Judge Wellford objected to the majority's focus on the content of the commencement prayers. He stressed that content was immaterial to the issue of governmental sponsorship of religion, because school officials played no part in composing the prayers, or even in choosing who would give them. He criticized the court for casting the issue in terms of content, especially since the plaintiffs' complaint objected not to "sectarian or denominational" prayers, but to "any reference to a Deity."⁴⁰⁵ According to Judge Wellford, the majority misread *Marsh*, because the Supreme Court in that case specifically declined "to embark on a sensitive evaluation or to parse the content of a particular prayer."⁴⁰⁶ Considering the "whole context" in which the activity took place, he would have sustained the invocations and benedictions in question: "Here there is, at most, a kind of acknowledgment of religion in a brief part of an annual commencement ceremony, which takes place outside of any classroom setting, and is not directed towards influencing young children at a formative period."⁴⁰⁷

On balance, the general approach in *Stein*, particularly of the dissent, represents a welcome departure from the strict separation rhetoric pervading numerous other decisions. Evaluated in light of this Article's animating principles, the *Stein* court correctly recognized that liberty of conscience in religious matters stands at the core of the religion clauses, and that this value should be fostered to the maximum extent consistent with public order and the rights of others. In addition, in sustaining commencement prayers, *Stein* accords with the Founders' intent to create a society receptive to voluntary religious expression and with their virtually unanimous belief that religion was an essential source of personal and public virtue.

By adhering to the emphasis in *Marsh* on the nation's tradition of

⁴⁰⁴ In his concurring opinion, Judge Milburn stressed that in order to pass constitutional muster, ceremonial prayers must be "nonsectarian and nondenominational" and as "secular" as those approved in *Marsh*. He also concluded that the challenged commencement prayers failed under the establishment clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). See *Stein*, 822 F.2d at 1410 (Milburn, J., concurring).

⁴⁰⁵ *Stein*, 822 F.2d at 1411 (Wellford, J., dissenting).

⁴⁰⁶ *Id.* at 1412 (Wellford, J., dissenting) (quoting *Marsh*, 463 U.S. at 794-95).

⁴⁰⁷ *Id.* at 1415 (Wellford, J., dissenting).

public prayer, the *Stein* court wisely placed the case in historical context, realizing that it should invalidate ceremonies deeply embedded in tradition only if clearly compelled to do so by the Constitution. Thus, the decision faithfully followed the principle of federalism; it evidenced a proper understanding of the judiciary's role in a free society. The Constitution, the nation's *fundamental* law, cannot legitimately be construed to afford redress to every citizen who takes offense at public expressions with religious, political, or secular content. Although the establishment clause forbids the state from sponsoring religiously coercive symbols and practices, it does not require the state to excise public symbols and practices merely because they may be offensive. The screening and elimination of offensive views and practices from public life is a characteristic of totalitarian regimes, not democratic states. The privilege of living in a free society, characterized by robust debate in a marketplace of ideas, entails exposure to conflicting and sometimes offensive views. To think that the Constitution should shield citizens from such views is a fundamentally undemocratic notion.⁴⁰⁸ This principle does not minimize the fact that some individuals are truly offended, but only emphasizes the proper role of the Constitution and the judiciary.⁴⁰⁹

It is under the principle of institutional separation that the decision in *Stein* encounters the greatest difficulty. In finding that invocations and benedictions pose little danger of religious indoctrination, the majority correctly discerned the importance of coercion to establishment clause analysis. Unlike the dissent, however, the majority did not realize that judicial examination of the prayers in question violated the religion clauses. This flaw was compounded when the court did not distinguish between governmental and private speech and when it essentially established "the American civil religion."

Like the court of appeals in *Bender*, the *Stein* court erroneously

⁴⁰⁸ In holding that a state could not censor a controversial motion picture as "sacrilegious," the Supreme Court stated: "[I]t is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952).

⁴⁰⁹ As Justice Cardozo asserted in *The Nature of the Judicial Process*:

[A judge] is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

B. CARDOZO, *supra* note 170, at 141 (footnote omitted).

focused its symbolic endorsement analysis on the location of the activity rather than the identity of the actor. There is a critical distinction between public prayers that are state-sponsored and those that are offered voluntarily by individual citizens. The former implicate grave establishment clause concerns, while the latter pose no significant threat, "symbolic" or otherwise. The commencement prayers in *Stein* were delivered by students or local clergy, once a year, in an environment in which it was clear that they spoke or prayed as private citizens, not as representatives of the school board. By requiring commencement invocations and benedictions to conform to the American civil religion, the *Stein* decision may have transformed private prayers into governmentally controlled prayers, making them official endorsements of the new "civil" religion.

The court probably misread the *Marsh* opinion regarding judicial examination of the content of prayers. In any case, it is a threat to religious liberty for the civil power, whether through judges, legislators, or executive officials, to tell citizens how they should pray in public or in private. The pietistic tradition of institutional separation rests on the notion that government officials exceed their authority when they interfere in religious matters by compelling conformity to acceptable or "orthodox" views. Apart from thrusting judges into the business of composing prayers and into a hopeless theological quagmire, the *Stein* court's review of particular commencement prayers to ensure "acceptability" under the American civil religion strikes at the heart of religious liberty.⁴¹⁰

Stein appears to be the first explicit recognition of American civil religion as a juridical concept. Judicial recognition of such a religion is somewhat ironic, as the scholars who formulated the concept now regard its utility as limited.⁴¹¹ The notion of an American civil religion

⁴¹⁰ Such a review invokes images of Queen Elizabeth's Act for the Uniformity of Common Prayer and Service in the Church, which granted Parliament the right to dictate the content of the prayer book used by the Church of England. See *supra* note 251 and accompanying text. For the pietistic separationists, opposition to this and similar acts stood at the core of the struggle for religious freedom. It deserves emphasis that the Court invalidated state-sponsored school prayer in *Engel v. Vitale*, 370 U.S. 421 (1962), in large part because government officials composed the prayer: "[The establishment clause] must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 425.

⁴¹¹ Sociologist Robert Bellah, one of the leading proponents of the concept in the 1960s, stated in 1975 that the "American civil religion is an empty and broken shell." R. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 139 (1975); see also Little, *American Civil Religion and the Rise of Pluralism*, 38 UNION SEMINARY Q. REV. 401, 410-11 (1984) (questioning the notion of civil religion as a unifying force in any sense other than agreement on legal process). The

by which to assess the constitutionality of time-honored religious practices is troubling in several respects.

First, constitutionally establishing a religion, civil or otherwise, is antithetical to the establishment clause itself. Troubled by the sectarian nature of some public religious expressions, the *Stein* court essentially erected an "orthodox" religion by which to judge these expressions. If the establishment clause means anything, it means at least that government cannot adopt and apply standards of religious orthodoxy. Second, the concept imposes another definitional task on the judiciary: in addition to defining "religion" under the religion clauses, a sensitive enough task, the judiciary must now define the contours of an amorphous religion with no recognizable adherents, clergy, ruling body, ritual, history, tradition, or sacred work. The first definitional task is difficult, the second is almost impossible. Certainly civil religion must be given content if it is to serve as the comparative paradigm for assessing the acceptability of "authentic" religious symbols and ceremonies in public life. But where do the courts look for guidance? Third, in giving the American civil religion content, the courts run the risk of favoring traditional and majority religions, thereby giving them a preferred status under the religion clauses. Fourth, as noted above, implementation of the concept strikes at the heart of the pietistic tradition by creating an unacceptable degree of interference in religious matters and by threatening authentic faith. Finally, raising the American civil religion to constitutional status gives government, through the courts, a powerful tool to justify and reinforce its own policies. As the standard for acceptability, the civil religion would enjoy a constitutionally preferred status that could be used to exclude prophetic voices from the public arena.

While the principle of accommodation does not compel invocations and benedictions at commencement ceremonies, it permits their inclusion as an acknowledgment of religion's important place in public life. Having said this, the principle of benevolent neutrality requires that the opportunity for offering commencement prayers be open to students and clergy of various faiths. A consistent pattern of prayers by ministers or students of the same denomination would signal the likelihood that the public school is preferring one religion over others.⁴¹²

In many respects, the Supreme Court has admirably discharged

Stein court relied on an article by legal scholar Yehudah Mirsky, rather than on the works of the scholars who formulated and have consistently debated the concept of civil religion. See *Stein*, 822 F.2d at 1409 n.5 (citing Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986)).

⁴¹² See, e.g., *Bogen v. Doty*, 598 F.2d 1110, 1114 (8th Cir. 1979) (sustaining invocations at county board meetings, but warning that constitutional problems would arise if the board limited participation to Christians).

the difficult and often thankless task of interpreting the religion clauses. If the justices decide, however, to embark on a course of excising the religious leaven from the nation's public life, they will undertake a difficult journey, likely to bring disfavor from the coequal branches and the American people. Moreover, they cannot do so legitimately in the name of the historic first amendment, one of America's signal contributions to Western civilization. The justices will have to look elsewhere for legitimation, perhaps to their own predilections or to brooding forces such as materialism or secularism, which seem to be pressing in on the culture from many directions. If they choose this course and create a "public square" devoid of religion, they may well regret the result.⁴¹³

C. *The Constitutional Definition of Religion*

No constitutional issue is more troubling today than that of deciding whether a belief system constitutes a religion under the first amendment.⁴¹⁴ Judicial definitions of religion have great impact, for if a set of beliefs does not constitute a religion, then its adherents are not afforded protection under the religion clauses. The proliferation of government programs and regulations in our society has heightened conflicts between facially neutral statutes and individual beliefs, pushing to the forefront the issue of which of these diverse beliefs fall under the mantle of the clauses. Cases involving new sects or unfamiliar beliefs generally present situations in which an individual must choose between deeply held convictions, on the one hand, and state entitlements, property interests, or liberty, on the other. Adherents of unfamiliar beliefs often seek relief from state burdens on free exercise grounds, thereby requiring the courts to determine whether the beliefs are in fact religious. Because the definitional issue was largely unforeseen by the Founders, the animating principles enumerated in this Article can provide guidance only in the broadest sense.

The United States Court of Appeals for the Third Circuit addressed the sensitive task of defining "religion" under the first amend-

⁴¹³ For the view that the ideology of secularism—the exclusion of "religion and religiously grounded values from the conduct of public business"—poses a dangerous threat to democracy, see R. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* at ix (2d ed. 1986).

⁴¹⁴ Among the numerous articles on this issue, see in particular Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); see also Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1519 n.3 (1983) (listing other authorities).

ment in *Africa v. Commonwealth of Pennsylvania*.⁴¹⁵ A prisoner named Frank Africa asserted that he was a member of a religion known as MOVE, which required a special diet of uncooked fruits and vegetables. He requested injunctive relief, claiming that the prison was violating his free exercise rights by denying him this diet. The district court held that MOVE was not a religion. The court of appeals affirmed, employing a definition-by-analogy approach consisting of three indicia:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.⁴¹⁶

In examining MOVE's beliefs, the court noted that the group rejected contemporary society and was committed to a natural, unadulterated lifestyle. Central to this lifestyle was a religious diet provided by God, which prohibited the consumption of processed or cooked food. Ingestion of such food constituted deviation from the "direct, straight, and true" and would result in "confusion and disease."⁴¹⁷

In applying the three-pronged definitional test, the court found that MOVE's tenets failed to meet the "ultimate" ideas criterion. Unlike recognized religions, MOVE referred to "no transcendental or all-controlling force" and did not broadly address matters of morality, mortality, or the meaning of life.⁴¹⁸ Its rejection of society appeared to be a product of a secular philosophy rather than religious conviction. In this respect, the members of MOVE resembled Henry David Thoreau, whose isolation at Walden Pond resulted from philosophical choices, rather than religious belief. The court emphasized that "the free exercise clause does not protect all deeply held beliefs, however 'ultimate' their ends or all-consuming their means."⁴¹⁹

Second, MOVE espoused a single governing idea, best described as a philosophical naturalism, rather than a comprehensive world view. It resembled single-faceted ideologies such as economic determinism or so-

⁴¹⁵ 662 F.2d 1025 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982). Judge Adams, one of the authors of this Article, wrote the opinion of the court.

⁴¹⁶ *Id.* at 1032 (citing *Malnak v. Yogi*, 592 F.2d 197, 207-10 (3d Cir. 1979) (Adams, J., concurring in result)).

⁴¹⁷ *Id.* at 1028 (quoting Frank Africa, Brief to Define the Importance of MOVE's Religious Diet).

⁴¹⁸ *Id.* at 1033.

⁴¹⁹ *Id.* at 1034 (relying on *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)).

cial Darwinism more than any recognized religion. Third, MOVE did not exhibit the structural characteristics of a religion—it had no clergy, no services, no holidays, and no scripture. The absence of these signs, while not controlling, strengthened the conclusion that MOVE was not a religion.

The Supreme Court has not defined religion for constitutional purposes, but decisions in other contexts reveal the steady expansion of the term “religion” to meet needs arising in an increasingly complex and pluralistic society. Dicta in older cases defined the term in traditional theistic terms as an individual’s belief in or relation to a Supreme Being.⁴²⁰ In the Viet Nam War era, the Court significantly broadened the definition in several conscientious objector cases. It held in *United States v. Seeger* that religious belief for draft exemption purposes connoted any sincere and meaningful conviction that occupied “a place in the life of its possessor parallel to that filled by the orthodox belief in God of [a theist].”⁴²¹ In more recent cases, the Court appears to have retreated from *Seeger*. In *Wisconsin v. Yoder*, it emphasized that “religion” did not encompass purely secular value systems such as Thoreau’s; his “choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.”⁴²² In 1981, the Court stated cryptically in *Thomas v. Review Board* that some claims may be “so bizarre” as to be “clearly nonreligious in motivation.”⁴²³

As *Africa* and Supreme Court precedent illustrate, the proliferation of new sects and belief systems has confronted courts with a task largely unforeseen by the Founders. Nothing in the historical record suggests that they thought it necessary to define the term “religion” in the first amendment. From every indication, the Founders appeared to agree on the basic content of the term, perhaps regarding it as almost self-evident. While some pluralism existed in the colonies, the religious groups were virtually all theistic and followed the Judeo-Christian model. As evident from the Virginia Declaration of Rights, Madison, Mason, Henry, Washington, Marshall, and others in Virginia ap-

⁴²⁰ See *Davis v. Beason*, 133 U.S. 333, 342 (1890) (defining religion in the context of an anti-polygamy case in terms of belief in a Supreme Being); see also *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) (stating in a naturalization case that “[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation”).

⁴²¹ 380 U.S. 163, 166 (1965); see also *Welsh v. United States*, 398 U.S. 333, 343-44 (1970) (conscientious objector decision expanding the *Seeger* test’s definition of “religious”).

⁴²² 406 U.S. 205, 216 (1972).

⁴²³ 450 U.S. 707, 715 (1981).

peared uniformly to regard religion as "the duty which we owe to our Creator, and the manner of discharging it."⁴²⁴ Among the pietistic separationists, Roger Williams espoused a definition, remarkable for its time, that included pagan, Jewish, Islamic, and anti-Christian worship.⁴²⁵ These views assist modern courts only insofar as they evidence an intent to construe liberally the scope of religious freedom. The Founders, in short, lived in a more homogenous society where religion was understood in a Judeo-Christian framework and where governmental contact with religion was far less extensive.

Unless one believes that the Framers drafted the Constitution as a static document, incapable of adaptation to meet new challenges, the definitional task is an area of interpretation where the originalist position affords no satisfactory solution. The Founders' theistic understanding of religion proves inadequate in twentieth-century America because it is underinclusive, failing to account for nontheistic religions such as Buddhism and Taoism. Consequently, in contrast to issues such as equal access and religious symbolism, the animating principles identified earlier can provide courts with only limited guidance in defining religion. These principles, however, yield at least three observations that may guide endeavors in this thorny area: the necessity of defining religion, the cautionary ideal of noninterference, and the need for a unitary constitutional definition of religion.

First, courts must continue to distinguish religion from nonreligion. The task is compelled by our fundamental law, for special protection is granted religion in the constitutional text. The Framers did not define the term, probably wisely so, but they did earmark the free exercise of religion for protection not accorded other conduct. Not every idea, belief, moral code, or philosophy can be regarded as religious. If it were otherwise, all deeply held beliefs that conflicted with civil duties would implicate the free exercise clause, requiring accommodation unless the government advanced a compelling interest. This would create a chaotic situation, particularly in a culture in which so many entitlements and consequences attach to a determination of religious purpose or conduct.

The historical principles of accommodation and benevolent neutrality rest on the premise that the Founders granted religion a special status in the Constitution. This status derived from a conviction that

⁴²⁴ VA. DECLARATION OF RIGHTS of 1776, art. 16, in 7 THORPE, *supra* note 18, at 3814; *see also supra* note 38 (discussing the Virginia Declaration of Rights).

⁴²⁵ *See* R. WILLIAMS, THE BLOODY TENENT, OF PERSECUTION, FOR CAUSE OF CONSCIENCE, *supra* note 19, at 3; *see also supra* note 185 and accompanying text (discussing Williams' expansive views on religious liberty).

religious exercise, as opposed to other personal and social forces, needed and deserved unique treatment. Although the Framers did not define religion for constitutional purposes, they clearly did not envision special protection for every deeply held moral code, ideology or set of beliefs.⁴²⁶

Second, the recognition that judges must distinguish between religion and nonreligion leads to a cautionary observation derived from the pietistic separationists. In shaping the principle of institutional separation that informs our heritage, they stressed the fragile nature of conscience and the destructive effect of governmental interference with religion. Their focus on noninterference counsels a recognition that the definitional task is a delicate one and that judges, not well equipped to deal with such matters, should reach this task only if all other means of resolution are foreclosed. Consider, for example, the adherent of an unfamiliar belief system who invokes a free exercise claim when the state is advancing a compelling interest. The court should avoid the definitional issue by holding that, even if the individual's claim is religiously motivated, she would not prevail. Similarly, if the factual record appears incomplete, the court should consider remanding the case before addressing the definitional issue; perhaps the case will be resolved on remand. In addition, courts should fashion and apply definitional tests with a view towards minimizing inquiry into the content and meaning of avowed religions.

Third, religion has the same meaning under both the establishment and free exercise clauses.⁴²⁷ Nothing in the text of the clauses or their generating history suggests a dual meaning. The view that religion should be more broadly construed for free exercise than for establishment purposes is of recent vintage, arising primarily because of problems generated by the Court's sweeping definition of the establishment clause in *Everson* and its progeny. With the Court's early adherence to strict separation and the "no-aid" principle, commentators feared that an expansive definition of religion under the establishment clause would result in the invalidation of numerous governmental programs with arguably religious premises or effects. These fears were perhaps unfounded, but in any case the dilemma stems from a misunderstanding of "establishment," not from a broad definition of religion. No dilemma exists if the establishment clause is understood in its his-

⁴²⁶ As Justice White indicated, "[i]t cannot be ignored that the First Amendment itself contains a religious classification." *Welsh v. United States*, 398 U.S. 333, 372 (1970) (White, J., dissenting).

⁴²⁷ A more extended defense of the unitary definition of religion is contained in *Malnak v. Yogi*, 592 F.2d 197, 210-13 (3d Cir. 1979) (Adams, J., concurring in result).

torical sense as a prohibition against those institutional alliances of church and state that threaten to coerce or influence religious choice. With this understanding, both "free exercise" and "religion" can be given broad content without fear of infringing the nonestablishment guarantee.

Defining religion for constitutional purposes has proven to be a highly controversial task, one characterized by developing and shifting analysis. To return briefly to *Africa*, for example, critics have asserted that its three-part definitional test favors Western models of religion, and that MOVE may have functioned as a religion in Frank Africa's life.⁴²⁸ It may be true that MOVE was central to Africa's life, but the "centrality" of an idea or belief system does not transform it into a religion. Under current judicial definitions, not every deeply held conviction that guides an individual's life is recognized as religious. Adoption of an expansive view would provide constitutional protection to a wide variety of philosophies that motivate individuals. People are devoted to a remarkable range of beliefs and activities: some are materialists and seek to accumulate wealth; others are hedonists, building their lives around the pursuit of pleasure; still others center their interests on secret societies or fraternal organizations. A definition that recognized as religious every fundamental or central influence in the lives of people would undermine the fundamental nature of the Constitution, generate further confusion in first amendment jurisprudence, and render it extremely difficult to create any sense of social cohesion.

Admittedly, the process of defining religion by analogy is a difficult one. Bias for traditional religions, the standard references for such an approach, may result in the exclusion of legitimate, although unconventional, religions. That is why the analysis does not inquire whether a belief system includes a God, a messiah, an afterworld, or a concept of sin. The analogy is drawn at the more general level of whether the belief system addresses ultimate concerns, the meaning of life, humanity's place in the universe, and a comprehensive range of moral concerns. Thus, the approach would encompass religions radically different from those in the Judeo-Christian tradition, such as Taoism, Hinduism, and Buddhism, but would exclude belief systems like Epicureanism, nihilism, solipsism, and communism,⁴²⁹ which arguably may

⁴²⁸ See, e.g., Slye, *supra* note 228, at 240 & n. 121 (maintaining that because the *Africa* test requires analogization to orthodox beliefs, it may result in judges ruling in favor of traditional religions, but against "less well-established religious groups").

⁴²⁹ Applying *Africa*'s definitional test to communism, for example, it is questionable that communism addresses "fundamental and ultimate questions" at a level analogous to that in traditional religions. Communism, a system of social order based on common ownership of the means of production, is more in the nature of a single-faceted

resemble religion in their scope, but certainly not in their essence or purpose.

CONCLUSION

Studying the history of law and ideas, as Sir Frederic Maitland cautioned, is a difficult task.⁴³⁰ It is a necessary task, however, for history provides an essential framework for resolving contemporary religious freedom issues. Those in the legal profession must look to the traditions and values of the American people as more than a source for "law office history" or for vague generalities to introduce the resolution of difficult cases. In order for the judiciary to use history properly, however, it is necessary for historians to take a more active role in addressing the historical aspects of emerging legal issues.

The Founders drew on rich and diverse ideas in formulating their views on church and state. They looked to the Protestant Reformers, Catholic humanists, English and American Puritans, Quakers, Baptists and other dissenters, Whig political theorists, natural law philosophers, and English jurists. From their experiences under the colonial establishments, the Founders learned that governmental coercion of conscience threatened the purity of religion and the peace of the state. Those in the Enlightenment, pietistic, and political centrist traditions approached the issue of church and state somewhat differently, but they agreed that religion was an indispensable source of public and private morality, and that the stability of the republic depended on fostering voluntary religious expression.

The principles animating the religion clauses can be discovered by examining colonial and early national antecedents on religious freedom, the legislative history of the clauses, and the Founders' beliefs and practices concerning religion and government. Historically, the establishment and free exercise clauses are best understood as co-guarantors of the core value of liberty of conscience in religious matters. The Founders implemented this ideal through the principles of federalism, institutional separation, accommodation, and benevolent neutrality. These animating principles provide important, although somewhat varying, degrees of guidance for the resolution of contemporary religious freedom issues. Their usefulness ranges from the assessment of historical precedent approved by the Framers, such as legislative chaplains, to relatively unforeseen problems such as the proliferation of religious

political philosophy than a comprehensive world view. In any case, communists themselves do not regard their system as religious.

⁴³⁰ See *supra* note * and accompanying text.

groups and the resulting need to define religion for constitutional purposes. Between these extremes lies a large middle ground, where one finds issues such as equal access for religious student groups in high schools and the presence of religious symbols and ceremonies in public life. It is in this middle area that the animating principles can provide significant guidance.

A more fundamental question concerns the place of religion in contemporary American society. Does it occupy the same place today as it did in previous generations? One commentator recently suggested, for example, that "the free exercise clause is an anachronism."⁴³¹ Asserting that the first amendment was primarily a product of Enlightenment philosophy, he remarked that religion may no longer merit a preferred constitutional status because American society has become largely secular.⁴³² This assessment fails to take adequate account of the dynamic role played by religion in history and in contemporary America. Historically, the religion clauses owe as much, if not more, to the pietistic and political centrist positions as to the Enlightenment. While it is true that secularization has occurred, religion remains a vital force in the nation and in the lives of numerous citizens. Indeed, many of the current religious liberty issues, such as the problem of accommodation, have arisen precisely because we are such a religious people.

The philosophy underlying the Constitution, as Professor Mansfield observed, is not necessarily secular.⁴³³ With respect to the religion clauses, it affirmatively recognizes the "spiritual element in man," and addresses "fundamental questions regarding human nature, human destiny and other such realities."⁴³⁴ Thus, the American heritage of religious liberty not only yields animating principles useful in deciding particular issues, it also discloses "general truths" about mankind. This heritage affirms that religion occupies a special constitutional status because it plays an essential role in shaping public and private virtue; it provides transcendent values and a degree of moral legitimacy not provided by other social forces; it shapes and holds people together through the most trying of times; it recognizes a domain for the conscience beyond the control of the state; and it stands, along with other mediating institutions, as a check on governmental power. Indeed, the Founders' political philosophy and distrust of centralized authority stemmed from

⁴³¹ Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 377.

⁴³² *Id.* at 377-78.

⁴³³ Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 904 (1984).

⁴³⁴ *Id.*

a skeptical view of human nature derived largely from religious principles. They established the republic on a premise articulated by John Adams in 1798: "Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."⁴³⁵ Whether the Constitution can endure in the absence of a moral and religious milieu remains to be seen.

⁴³⁵ Letter from John Adams to a unit of the Massachusetts militia (Oct. 11, 1798), in 9 WORKS OF J. ADAMS, *supra* note 129, at 229. See *supra* note 130 and accompanying text.