BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

Benjamin N. Cardozo School of Law
Jacob Burns Institute for Advanced Legal Studies
2006
Working Paper No. 171

The Religious Origins of Disestablishment Principles

Marci A. Hamilton
Paul R. Verkuil Chair in Public Law
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, NY 10003
United States
(212) 790-0215 (Phone)
(212) 790-0205 (Fax)
Hamilton02@aol.com

Rachel Steamer
J.D., 2005 Benjamin N. Cardozo School of Law

The Religious Origins of Disestablishment Principles

Marci A. Hamilton[*] & Rachel Steamer[**]

"[A]ll of the most pregnant concepts of modern doctrine are secularized theological concepts." --Carl Schmitt[1]

The United States did not begin as a unified Christian culture, but rather as a pluralistic collection of religious believers, some living in tension with other believers and some more tolerant. While it is true that the vast majority of denominations were Christian, the sense of difference among them was profound. There were Anglicans, Congregationalists, Methodists, Deists, Dutch Reformed, Baptists, Presbyterians, Quakers, and Catholics, as well as Jews. Protestants, taken as a whole, extended a strong influence, but the category, "Protestant," hides a wide array of religious beliefs and institutions – none of which ever held sole power over all of the colonies or states. The diversity of faith meant that there were numerous religious perspectives available to influence governing structures and theories. Conversely, it also means that no one religious tradition can claim sole responsibility for the structures that have been chosen. There are numerous distinctive influences that led to basic establishment principles recognized today, including (1) the functional separation of church and state in the society; (2) a prohibition on government preferring one religion over another; (3) a right

[*] Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law, Yeshiva University; hamilton02@aol.com I thank Elisabeth Zoller for organizing the symposium at which I delivered an earlier version of this article and Rachel Lavery, **Jonathan Miller, Jessica Neff, and Stan O'Loughlin** for **their** excellent research assistance.

[**] J.D. 2005, Public Interest Fellow, Benjamin N. Cardozo School of Law, Yeshiva University. With most sincere gratitude to Marci Hamilton for this opportunity and her tremendous mentorship.

[1] CARL SCMHITT, POLITISCHE THEOLOGIE, VIER KAPITEL ZUR LEHRE VON DER SOUVERÄNITÄT 49 (1922).

against government coercion of belief; (4) government tolerance of all religious belief (even if not all religious conduct); and (5) the necessity of embracing the principles of democratic republican governance even as one is a member of a church that employs very different governing principles.

Today's Establishment Clause jurisprudence is a collection of principles -- not a single rule – that operate to calibrate the balance of power between church and state. To use Justice O'Connor's phrase, there is no "Grand Unified Theory," nor can there be.[2] Part of the reason for the conglomeration of principles can be found in the fact of diversity from the start. This Article is an intellectual, religious history of the Establishment Clause.

The First Amendment's Establishment Clause is a curious element of the Constitution. The main body of the Constitution was crafted solely for the purpose of establishing the building blocks of the American system of government– the Congress, the President, the Supreme Court, and the states--and enumerating their powers. Other than the prohibition on religious oaths as a prerequisite for taking public office, religion is simply not mentioned in the Constitution.[3] The Framers' conscious decision not to reference religion in the Constitution was the first indication in the newly formed United States that no religion or collection of religions would hold the reins of political power, or make the decisions that govern citizens. The government would be run by citizens who could not be required to declare their particular or any religious belief in order to serve,

[2] Bd. of Educ. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor J., concurring in part and judgment).
[3] U.S. CONST. art. VI, cl. 3 states: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, 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."

and who exercised only the powers enumerated in the Constitution, which did not include the power to inculcate or enforce any religious belief.

With the exception of the Religious Test Oath Clause,[4] the body of the Constitution did not specifically address religion. Only with the Bill of Rights, and specifically the First Amendment, did the role of religion in the culture become an explicit topic: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .."[5] As I have argued in previous articles, it is more akin to a separation of powers principle than any rights principle.[6]

Some scholars and litigators have attempted to reduce the rich complexity of Establishment Clause doctrine to a right of religious entities to be free of government interference.[7] While there is little question that the Establishment Clause encompasses

---

[4] "The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, 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." U.S. CONST. Art. VI.

[5] U.S. CONST. amend. 1.

[7] Marci A. Hamilton, Commentary, *Power, the Establishment Clause, and Vouchers*, 31 **CONN.** L. REV. 807, 808 (1999) (arguing that "[t]he Establishment Clause is a particular example of the Constitution's separation of powers. The concept of separation of powers is often ascribed solely to the question of the proper relationship between the federal branches, but the entire Constitution is governed by the overarching principle that society is best served when centers of power are kept separate. Indeed, the most important contribution the American experiment has made to liberty may well be its extension of the concept of separation to the church-state relationship."); *id.* at 826 (explaining that "[t]he Court's context-dependent and era-dependent doctrine has accreted so that the clause can redress not any one particular evil but rather a series of evils that have revealed themselves as time marches on. The underlying question posed throughout the establishment cases is whether the balance of power between church and state is tipped by the particular law under attack. The presumption standing behind this question is that the current status quo likely presents an acceptable balance of power. It is not the *only* acceptable balance that might be struck, but it is acceptable at this stage in history, because the earmark of an inappropriate balance--tyranny by either church or state--is not evident."); *see also* Marci A. Hamilton, Commentary, *A Reply*, 31 **CONN.** L. REV. 1001 (1999).

[7] *See generally* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998); *see also* Jay Alan Sekulow, James Henderson & John Tuskey, *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1070 (1995) ("The separation myth is pernicious. Reliance on separation blurs the line between state and private action and in the process restricts religious freedom and free speech. It is one thing to say government should not be in the business of running churches or telling people how and when to practice religion; it is quite another to attempt to justify censorship of private religious speech or efforts to prevent people from bringing their religious beliefs to bear on public policy. The former position restricts

such a principle, it also includes the reverse principle that religious entities may not unduly interfere with a neutral government governing in the larger interest.[8] Religious organizations, like the Baptists, first emphasized this latter principle at the time of the founding, so it cannot be persuasively argued that an Establishment Clause that places meaningful limits on religious political power is necessarily anti-religion.

The Establishment Clause pairs the two most authoritatives structures of human existence – religion and the state – in an attempt to keep either one from overpowering the other. It is not an easy balancing act, and requires vigilance, but the remarkable vigor of diverse religious belief and the federal government's stability shows that the balance has held to a strong degree. Just as the Court has had to employ more than one principle to bring the federal branches into relative balance,[9] and the federal government in balance with the states,[10] it has identified numerous principles needed to achieve the appropriate balance of power between church and state.[11]

---

government action and advances private religious freedom; the latter position restricts private action and cabins religious freedom and free speech by denying religious adherents the same rights to speak and petition the government as other citizens have."); Richard W. Garnett, Essay, *Christian Witness, Moral Anthrolpology, and the Death Penalty*, 17 ND J. L. ETHICS & PUB POL'Y 541, 550 (2003) ("The First Amendment's 'Establishment Clause' is directed at governments only; it neither mandates nor implies a duty of self-censorship by believers; it does not demand a Naked Public Square; and active and engaged participation by the faithful is perfectly consistent with the institutional separation of church and state that the Constitution is understood to require.).

[8] *See* Engel v. Vitale, 370 U.S. 421, 431 (1962) ("[The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.").

[9] *See, e.g.*, A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (nondelegation principle); INS v. Chadha, 462 U.S. 919 (1983) (formal procedures principle); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936) (executive authority or internal affairs doctrine); Bowsher v. Synar, 478 U.S. 714 (1986); Morrison v. Olson, 487 U.S. 654 (1988) (independent counsel).

[10] *See* Tennessee v Lane, 541 U.S. 509 (2004) (respect for dual sovereignty); Printz v. United States, 521 U.S. 898 (1997) (anti-commandeering principle); United States v. Lopez, 514 U.S. 549 (1995) (requiring congressional identification of the enumerated power under which it enacts a law so as to ensure it does not stray beyond its enumerated powers).

[11] *See supra* notes xx-xx

In order to understand the United States' disestablishment principles, it is helpful to examine the establishments that preceded the Constitution, both in England and in the colonies.[12] There are important differences between the English form of establishment and the early American that yield insights regarding the relationship between church and state in each.

I. English Establishment: The Effect of One Church, One Monarch on Politically Powerless Religions

The paradigm for religious establishment in England occurred during the reigns of Catholic Queen Mary (1553–1558) and Protestant Queen Elizabeth (1558–1603). They enforced two completely separate religious traditions, but the political order was the same. Both required all members of the realm to profess the same faith.[13] Both had religious dissenters put to death or forced into exile. Mary had nearly 300 executed in just four years, many by burning, earning her the name "Bloody Mary" in protestant folklore.[14] During the long reign of Elizabeth, religious persecution included some executions but also took other forms including branding, imprisonment and torture.[15] They held combined civil and sectarian power. After King Henry VIII's Protestant reign, Mary

[12] I focus on England, because so much of American law has been borrowed from the English common law system. There were establishments, of course, in other European counties, including Roman Catholicism in Spain and Lutheranism in Sweden.
[13] *See* 1 WILLIAM S. HOLDSWORTH, I A HISTORY OF ENGLISH LAW 591-92 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956).
[14] H. F. M. PRESCOTT, MARY TUDOR 299, 381 (1953).
[15] *See* THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY 411-13, 436-37 (G.R. Elton ed., 1960) (Those executed during Elizabeth's reign were often religious dissenters, but their convictions were ostensibly secular, e.g., for treason); *see also* LACEY BALDWIN SMITH, ELIZABETH TUDOR: PORTRAIT OF A QUEEN 158 (1975); DAVID STARKEY, ELIZABETH: THE STRUGGLE FOR THE THRONE 302-303 (2001); WILLIAM P. HAUGAARD, ELIZABETH AND THE ENGLISH REFORMATION 310, 325 (1968); CONYERS READ, THE TUDORS: PERSONALITIES AND PRACTICAL POLITICS IN SIXTEENTH CENTURY ENGLAND 196-97 (1963).

restored papal supremacy in England, but she was the head of the Church in Britain.[16] When Elizabeth became queen, she restored the title Henry VIII first instituted, "Supreme Governor" of the Church of England.[17]

Thus, the English establishment was characterized by a single solitary faith at the helm of political power, capable of using the coercive power of the state to enforce its beliefs. The established religion held a monopoly on power. To be sure, over the course of time, England became more open to other faiths, but to this day, there is a single faith that is the faith of the realm, Anglicanism, and it continues to enjoy some special favors. For example, it is illegal to express contempt or blasphemy against the Church of England. Additionally, its most senior bishops have designated seats in the House of Lords, where they are referred to as "Lord Spiritual."[18]

The fierce church/crown establishments in Britain that followed the beginning of the Protestant Reformation, generated religious dissenters. The established religion alternated between Catholic and Protestant: it was Catholic under Henry VIII until 1534 and then Protestant under Henry VIII until his death in 1553; Catholic under Queen Mary until 1558; and Protestant (Church of England) from 1558, when Queen Elizabeth assumed the throne, to this day.[19] For economic and religious liberty reasons, many of these dissenters found their way to the American colonies.

During the reign of Henry VIII, England definitively broke from Rome and the Anglican Church became entrenched. The Puritans thought the Reformation incomplete

---

16 G. R. ELTON, ENGLAND UNDER THE TUDORS 215-16, 219-20 (1974).

17 WILLIAM S. HOLDSWORTH, I A HISTORY OF ENGLISH LAW 591-92 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956) (describing the Act of Supremacy (1559), "restoring to the crown the ancient jurisdiction over the state ecclesiastical and spiritual and abolishing all foreign power repugnant to the same.")

18 James W. Torke, *The English Religious Establishment*, 12 J. L. & REL. 399, 412 (1995-1996). *See also* ARLIN M. ADAMS & CHARLES EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 53-54 (1990).

19 ELTON, *supra, at* 135-37, 217, 270.

because "the Church of England should be purged of its hierarchy and of the traditions and ceremonies inherited from Rome."[20] But they were not only concerned with cleansing the apparatuses of the Church, they saw their command from God even more broadly. For Puritans, not only the church but "[t]he world itself required discipline."[21] Elizabeth's successor, James I (1603-1625), exacerbated the situation by his open disdain for the sect and his attempts to run the Puritans out of England.[22] The situation became unbearable under Charles I (1625-1649), who succeeded his father James and furthered the anti-Puritan agenda.[23]

Charles was married to a Catholic – Henrietta Maria of France -- and Puritans suspected his religious and political allegiances for that reason alone. However, the Puritans' issues with the new monarch were more fundamental. In governing both church and state, Charles actively promoted ideas that were diametrically opposed to Puritan theology of predestination. The growing prominence of Arminians within the Anglican Church, which Charles endorsed, offended the Puritans.[24] The Arminians believed "that men by their own will power could achieve faith and thus win salvation,"[25] which was antithetical to the Puritan belief in predestination. The Puritans had a vocal minority in Parliament, and tended to look to the members for relief. By 1629, **t**hey

---

[20] EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 7 (1958); *see also* FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 41 (2003).
[21] MORGAN, *supra,* at 17.
[22] James issued royal decrees that prohibited Puritan bans on various social activities, and he publicly linked them with Catholics, both of whom he saw as having interests beyond his kingdom. LAMBERT, *supra,* at 39; MORGAN, *supra,* at 17. To a certain extent, James succeeded in his quest to rid England of Puritanism. Separtist Puritan groups arose that refused to accept the authority of the Church of England. The Puritans commonly referred to as the Pilgrims left England for Holland, and eventually founded Plymouth Plantation. MORGAN, *supra,* 31. However, the more influential Puritans, in terms of American constitutionalism, are the Puritans who stayed in England, continuing the march toward reform, which they saw as requiring them "to live in the world without being of it." *Id.*
[23] MORGAN, *supra,* at 27-28; LAMBERT, *supra,* at 43.
[24] MORGAN, *supra,* at 27-29.
[25] MORGAN, *supra,* at 28.

persuaded the House of Commons to pass resolutions attempting to stem the tide of Arminianism.[26] Charles' response was to dissolve Parliament, as he had in the past when he disagreed with their acts.[27]

Against this backdrop, a group of 400 Puritans, led by John Winthrop, left England under the guise of a charter to the Massachusetts Bay Company. "The colony would not be a mere commercial enterprise, nor would it simply be a hiding lace from the wrath of God. It would instead be a citadel of God's chosen people, a spearhead of world Protestantism."[28] The company's charter for a colony was commercial, but the Puritans were also able to take advantage of its liberal terms and set up their own government, "effectively remove[ing] the colony from control by the Crown."[29] By moving to New England, the Puritans hoped to establish self-governance that "could create in New England the kind of society that God demanded of all His servants but that none had yet given him."[30] Ironically, they repeated some of the ways of their tormentors in England, and established their religion in the Massachusetts Bay Colony.[31]

At the same time, a new sect of Christians was taking shape in England. The Quakers, formally the Religious Society of Friends, attracted thousands of converts in the North of England. Led by the charismatic George Fox, the movement eventually spread

---

[26] The House of Commons "demanded an end to unparliamentary taxation [by the King] and the suppression of the Arminianism in the church. They even passed a resolution that anyone who attempted to bring either popery or Arminianism should be accounted as a capital enemy of the King and kingdom." MORGAN, *supra*, at 29.

[27] *Id.* at 27-29. ("When his first Parliament refused to grant him the funds he wanted and began to talk about his policies, [Charles] dissolved it. . . .When [his second] Parliament, too, began talking about matters which he did not think concerned the members, he sent them home. . .A week [after the Arminian resolutions] on March 10, 1629, he formally dissolved Parliament and made it plain that he did not intend to call another."). Charles was eventually overthrown when supporters of a parliamentary system clashed with monarchists in a bloody civil war. In 1649, the British Commonwealth was established under the control of Oliver Cromwell.

[28] *Id.* at 46-47.

[29] *Id.* at 46.

[30] *Id.*

[31] *See* LAMBERT, *supra* note XX, at 44-45.

throughout Great Britain and by 1660, Quaker meetings were being held in every county in England, with London becoming a major Quaker center.[32] Quakers were confrontational, open dissenters whose radical new theology, based in equality principles, was viewed as a threat to the establishment. As early as 1653, their challenge to Anglicans led to official repression. As a result, Quakers "faced accusations of witchcraft, treason, and being secret agents of the pope. Many were imprisoned on charges of vagrancy and blasphemy."[33] In part to escape nearly constant harassment and in part to proselytize, in 1656**,** Quakers began to find their way to the colonies.

In contrast, the Anglicans expanded their establishment in England to Virginia. In 1606, King James incorporated the Virginia Company, declaring that its mission would be to bring the "Christian religion to such people, as yet live in darkness and miserable ignorance of the true knowledge and worship of God."[34] The evidence shows, however, that in the early days of the colony, at least, little attention was paid to religion as colonists focused first on survival and then on making a profit from cultivating tobacco.[35] In 1609, a new governor, Thomas Gates, who was an Anglican, arrived in the colony and led a religious revival, with the hope that it would restore order.[36] Building on this foundation, a military governor, Lord De La Warr, arrived in 1610 and "imposed martial law on Virginians and made [the Anglican] religion a strategic part of gaining and exercising social and political control."[37] From that point forward, the Anglican church and the state government were inextricably entwined in Virginia.

---

[32] THOMAS D. HAMM, THE QUAKERS IN AMERICA 18 (2003).
[33] *Id.*
[34] LAMBERT, *supra* note XX, at 46.
[35] *Id.* at 47-49.
[36] *Id.* at 50.
[37] *Id.* at 51. The law stated:

The Virginia assembly asserted itself by passing laws regarding religious uniformity beginning in 1632. The first of these called for "uniformite throughout this colonie both in substance and circumstance to the cannons & constitutions of the church of England as neere as may bee and that every person yield readie obedience unto them upon penalite of the paynes and forfeitures in that case appointed."[38] Catholics, Puritans and Quakers, not to mention non-Christians such as Native Americans and African slaves, were expected to submit to the Anglican Church for the sake of maintaining order in the colony.[39]

II. Early American Establishment: Single and Multiple Establishments

Some of the early establishments in the colonies exhibited characteristics that were similar to the English model. For example, in Georgia, Maryland,[40] North Carolina, South Carolina and Virginia, the Anglican Church was established and in political control.[41] In Virginia, Anglicans were the beneficiaries of a mandatory tithe, state-

---

> Since we owe our highest and supreme duty, our greatest, and all our allegiance to him from whom all power and authoritie is derived. . .I do strictly command and charge all Captaines and Officers. . .to have a care that Almightie God be duly and daily served, and that they call upon people to heare Sermons, as that also they diligently frequent Morning and Evening praier themselves by their owne exemplar and daily life, and duty herein, encouraging others thereunto, and that such, who shall often and willfully absent themselves be duly punished according to the martiall law in that case provided.

Id. (quoting David Flaherty, ed., For the Colony in Virginea Britannia: Lawes Divine, Morall and Martiall, comp. William Strachey 9 (1969)).

[38] *Id.* at 67 (quoting Cushing, Colony Laws of Virginia 1:180).

[39] *See id.* at 68-72.

[40] Maryland was founded in 1633 by the Catholic Lords Baltimore, as an experiment in toleration. In 1649, Maryland's Act Concerning Religion allowed free exercise for all Christians, regardless of sect. *See* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 21 (2000); ADAMS & EMMERICH, *supra* note 10 at 5 (1990). In 1689, however, the Anglican Church was established in Maryland after the Glorious Revolution of William and Mary in England and a rebellion in the colony. JAY P. DOLAN, THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM COLONIAL TIMES TO THE PRESENT 75 (1992).

[41] LEONARD LEVY, THE ESTABLISHMENT CLAUSE 5 (2d Ed. 1994).

controlled Anglican worship, and land grants. In contrast, Baptist, Congregationalist, and other clergy were subject to imprisonment, fine and expulsion, while Roman Catholics were barred from becoming public officials. During the thirty-year period between 1720 and 1750, indictments for failing to worship with the Anglicans exceeded the indictments for other crimes. Avoiding the legally required tithes was a "close second."[42]

In Massachusetts, the Puritans, or Congregationalists, held the political power, and exile was used for apostates. For example, Roger Williams was exiled for having beliefs that threatened the Puritan colony in Salem. Williams

> believed that the Church of England was not a true church because of its alignment with the Church of Rome under the rule of Mary Tudor and because it was a 'national church' instead of a visible congregation consisting only of true Christians. He maintained that a true church could only be one that separated from the false Church of England and renounced any past and future association with that church.[43]

His most extreme position, though, portended the eventual American order and the Establishment clause. In particular, he believed the civil authorities' "power extended only to the 'Bodies and Goods, and outward state of men, & c.'"[44] In other words, issues of faith fell outside the civil government's power. He challenged the very order the Congregationalists intended to institute, and argued that the Ten Commandments contained separate instructions for civil and religious governance. The first four instructed believers of their obligations toward God. The rest, which included injunctions against adultery and murder, belonged to the civil government according to Williams.[45]

---

[42] Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV 1071, 1092-93 (2002) (citing A.G. Rober, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF THE VIRGINIA LEGAL CULTURE, 1680-1810, at 141-42 (1981)).
[43] Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U.L. REV. 455, 466 (1991).
[44] *Id.* at 467 (quoting ROGER WILLIAMS, *Mr. Cotton's Letter Lately Printed, Examined and Answered*, in 1 COMPLETE WRITING OF ROGER WILLIAMS 325 (Russell & Russell eds. 1963)).
[45] *Id.*

The story of Anne Hutchinson is also illustrative. Hutchinson was a Puritan who settled the Massachusetts Bay Commonwealth in 1629 and a righteous woman who held weekly prayer sessions in her home during which she would elucidate the sermon that had been delivered that week at church. She was a compelling and thoughtful speaker, and attendance at the sessions was heavy. Indeed, the most important and powerful members of the Puritan society regularly attended.[46] Over the course of time, however, she came to believe that the

> leaders of the church . . . had fallen into a covenant of works. "Legalists" all, they mistakenly took sanctification - the successful struggle of the saint against sin - as evidence of election, failing to understand that works and redemption bear no necessary connection. In essence Hutchinson spoke for a doctrine of free grace, characterized by the [new] inefficacy of works and the absolute assurance of the saint.[47]

Hutchinson's religious vision was radical for her religious community, as she rejected part of the prevailing theology.

The Orthodox Puritans of the day, exemplified by the governor of the Massachusetts Bay Colony, John Winthrop, believed in a "covenant of grace" – that election by God was the soul's salvation. However, they also believed that the elect must "prove their worthiness by displaying faith and performing works, such as good deeds and socially appropriate behavior" [48] – a "covenant of works." When contrasted with the beliefs of Catholics that salvation was possible through rote performance of the sacraments, one can see the importance of the covenant of works. It would be impossible for corruption to flourish in a Puritan community, as they had seen under Catholic rule in

---

[46] *See* NATHANIEL HAWTHORNE, TALES AND SKETCHES 18-24 (Roy H. Pearce ed., 1982).
[47] AMY S. LANG, PROPHETIC WOMAN: ANNE HUTCHINSON AND THE PROBLEM OF DISSENT IN THE LITERATURE OF NEW ENGLAND 4-5 (1987).
[48] EVE LAPLANTE, AMERICAN JEZEBEL: THE UNCOMMON LIFE OF ANNE HUTCHINSON, THE WOMAN WHO DEFIED THE PURITANS 51(2004); *see also* MICHAEL P. WINSHIP, THE TIMES & TRIALS OF ANNE HUTCHINSON: PURITANS DIVIDED 1, 12-16 (2005).

England, if salvation was dependent on one's deeds as well as their belief. But Hutchinson rejected the covenant of works, for she could not overcome the seemingly contradictory beliefs that "grace is absolute and controlled by God; [but] damnation is conditional on a person's behavior."[49] Rather, Hutchinson believed and began to preach that salvation was only possible through a covenant of grace. Justification and sanctification were "witnessed and sealed by the spirit and [could not] be tested by outward means."[50] Her views were considered dangerous enough to cause her to be expelled from the Puritan community.

Suppression of Quakerism was fierce on both sides of the Atlantic. In England, "Quakers found themselves mobbed and run out of towns. Individual Friends faced accusations of witchcraft, treason, and being secret agents of the pope. Many were imprisoned on charges of vagrancy and blasphemy."[51] Reaction to the Quaker movement in the colonies was even more dramatic, especially in the Puritan Massachusetts Bay Colony.[52] Laws were passed to impose steep fines on anyone entertaining, concealing, or transporting a Quaker in the colony.[53] For the Quakers themselves, the punishment was even more severe. Banishment was the standard for first-time offenders, but many Quakers saw it as their duty to carry their message in search of converts. When three Quakers returned to Boston in 1658, they had their ears cropped, which led the colonial government to pass, the following year, the ultimate penalty – death – for any Quaker

[49] LAPLANTE, *supra*, at 86; *see also* WINSHIP, *supra* note 49, at 16.
[50] LANG, *supra* note XX, at 7.
[51] *Id.* at 18.
[52] While the penalties for Quakers were most severe in Massachusetts, other colonies also moved quickly to suppress the influx of Quakers, most notably New Amsterdam (later New York) and Virginia, which in 1660 passed the Act for Suppressing the Quakers, which imposed a fine of 100 pounds upon any ship's master who brought into the colony the "unreasonable and turbulent sort of people commonly called Quakers." BACON, *supra* note XX, at 38.
[53] *Id.* at 30-31.

who returned once banished.[54] In a period of 18 months, four Quakers, including a woman, Mary Dyer, were hanged.[55] The bloodlust for Quakers only subsided when their English counterparts appealed to King Charles II (1660-1685), who sent a writ of mandamus to Boston, ordering all Quakers currently in custody released.[56]

In contrast to the establishments of a single faith, some colonies and then states recognized multiple establishments. That is, no single religion was established. For example, the state would tax the people, but each individual could designate to what church the tax proceeds should go.[57] Thus, establishment did not mean that a single church exercised political power or state financial support, but rather the government collected a general tax that was then distributed through different religions. By the time of the framing of the First Amendment, the norm was multiple establishment, which meant that no one set of religious beliefs could claim the power to dictate public policy. They could be supported by funds raised through the coercive power of the state, but none of them alone could claim that their particular theology was sufficient to determine the law. Thus, the multiple establishments were a significant departure from the earlier single establishments. They were an interesting and early form of power-sharing between religious institutions as well as a harbinger of the peaceful coexistence of diverse religious groups in the United States.

---

[54] *Id.* at 31.
[55] *Id.* The three Quaker men to be hanged were William Robinson, Marmaduke Stephenson and William Leddra. Today, a statute of Mary Dyer stands opposite Boston Common on the State House grounds. The inscription reads, "Witness for Religious Freedom. Hanged on Boston Common, 1660." *Id.*
[56] *Id.* at 33. While the death penalty was no longer used, new laws were passed after the King's mandamus, including the Cart and Whip Act, "under which any banished Quaker who returned would be tied to the end of a cart and whipped through town." *Id.* at 34.
[57] LEVY, *supra* note 12, at 10.

By 1833, though, there were no established churches in the United States.[58] The movement toward disempowering religious entities was fostered by a conglomeration of religious principles present in the culture. While no one religion or theology can claim provenance over the Constitution, it is very interesting that religious leaders and their theologies were key in developing the principles of disestablishment that compose the doctrine today. The following brief survey is an introduction to the religious forces at work over time – Calvinist (which includes the Congregationalists and the Presbyterians), Quaker, Baptist, and Roman Catholic.

III. Religious Influences on the Meaning of the Establishment Clause

This Article traces the connections between the distinctive views of religious organizations in the United States and disestablishment principles derived from their public positions. This is not a theological inquiry, but rather an investigation into the contributions of religious organizations, operating within the United States society and deriving principles from their experiences here. Each principle is tied to theology in some way, without question, but the principles are not derived from abstract precepts. Instead, they are the result of the religious organization's relationship with society and other religious entities.

A. The Calvinists: Functional Separation and Nonpreferentialism

[58] ADAMS & EMMERICH, *supra note 10*, at 20.

> [T]he core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions,' The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.[59]

One of the more interesting elements of the complicated history of ideas that eventually led to disestablishment in the United States was that religious organizations with the same theological heritage made dramatically different contributions. The Congregationalists and the Presbyterians, who both derived their beliefs from John Calvin, advocated very different principles. As is so often the case, their principles were not driven solely by theology but also by the historical incidents that placed them in relative positions of power or weakness.

1. The Congregationalists: Distinguishing the Functions of Church and State

The Congregationalists, sometimes referred to as Puritans, did not tolerate dissent, but they did institute a workable distinction between church and government. Massachusetts instituted the principle of multiple establishments, where each town could choose a minister to receive the collected taxes each year. In fact, however, the Congregationalists' majority presence meant that in nearly every town in Massachusetts the Congregationalists were the established church.[60] Massachusetts' law also recognized the principle of nonpreferential government aid to religious organizations, and therefore, in theory, a believer's establishment tax could be remitted to his local

[59] Larkin v. Grendel's Den, 459 U.S. 116, 126-27 (1982) (quoting Abington School District v. Schempp, 374 U.S. 203, 222 (1963)) (internal citation omitted).
[60] LEVY, *supra* note 12, at 17.

congregation. In practice, the minority religions did not receive much state aid, which flowed almost exclusively to the Congregationalists.[61]

In part, the separation of church from government by the Congregationalists was driven by historical circumstance:

> In some respects, they achieved this separation with little deliberate revision of existing social structures. For example, simply by migrating from England to Massachusetts the Puritans left behind one of the chief entanglements of the church in civil affairs: the ecclesiastical courts of the Church of England. Because there were no high officials of the Anglican church in the New World, there were no ecclesiastical courts. Thus, the probating of wills and matters of marriage and divorce, which in England were subject to the jurisdiction of the ecclesiastical courts, were in the Massachusetts Bay Colony matters of purely civil concern.[62]

Soon after settling in Massachusetts Bay, the Congregationalists decided to separate church leadership and elected civil officers, and prevent church control of the civil sphere by insulating elected officials from clerical control. Their experiences with the ecclesiastical courts in Britain and as dissenters there had led them to distrust those in positions of power. As one Congregationalist leader put it, "Power is too intoxicating and liable to abuse."[63] They also believed that "God had created various covenants for the organization and ordering of human society, including (1) a social or communal covenant, (2) a political or governmental covenant, and (3) an ecclesiastical or church covenant."[64] In other words, God himself recognized three distinct spheres within which humans operated: the social, the political, and the religious. By distinguishing one sphere from another, the Congregationalists took American governance to a new plane.

---

[61] *Id.* at 31.
[62] Hall, *supra* note 14, at 463.
[63] PETER WHITNEY, THE TRANSGRESSION OF A LAND PUNISHED BY A MULTITUDE OF RULERS 21 (1774), *quoted in* John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41, 58 (1990).
[64] *Id.* at 44.

Under the novel Congregationalist governing system, no public official could lose office as a result of excommunication. And while an elected magistrate could punish heretics, he could only do so if the person made public – as opposed to private -- statements against the church.[65] These adjustments to the relationship between church and state were motivated by the fear of tyranny that was caused "'either by giving the Spiritual Power which is proper to the Church into the hand of the Civil Magistrate . . . or by giving Civil Power to church officers, who are called to attend to Spiritual Matters and the things of God.'"[66] Thus, they envisioned separate working spheres, or covenants, for church and state. That, in itself, was a large step from the unity of church and state in the monarchy in Britain.

One cannot, however, conclude that the Congregationalists thereby advocated strict separation of church and state, because they did not. While the functions of church and state were distinct, they were nevertheless coexistent and therefore inevitably related to each other. For John Cotton, a leader of the Boston church, church and state "may be close and compact, and coordinate to one another and yet not be confounded."[67] According to Professor Timothy Hall, "Church and state were, according to common understanding, 'like Hippocrates twines, they are borne together, grow up together, weepe together, sicken and die together.'"[68]

The Congregationalists' new system, however, did not entail the freedom of conscience. Despite the functional distinction between the offices of church and state, dissenters were punished. The Baptists, for example, rejected the Congregationalist

[65] Hall, *supra* note 14, at 463.
[66] *Id.* at 463-64 (quoting John Cotton).
[67] *Id.*
[68] *Id.*

practice of infant baptism. While the Congregationalists viewed baptism as a symbol of an enduring communal covenant with God (and therefore baptized children), Baptists saw the practice as a rite solely for believing Christians (namely, adults). The latter therefore came into conflict with the law mandating infant baptism. The Baptists, who practiced civil disobedience, often refused to baptize their young children or, alternately, turned their backs or covered their ears as the rite was performed. For flouting the magistrate's requirement, Baptists faced court warnings, fines, and possible whippings and imprisonment. [69]

The religious freedom granted by the Congregationalists in the Massachusetts Bay Colony was the freedom for dissenters to leave their jurisdiction, in other words, the "free liberty to keepe away from us."[70] The Baptists and Quakers did not embrace this supposed liberty; rather, they stayed in the colony and faced fines, whippings, incarceration, and in the case of the Quakers, death, for their religious dissent. The Congregationalists did not see themselves as persecutors, however, even though they punished heresy with fines and whipping *"for sinning against the conscience."*[71]

We see in the Congregationalists, therefore, a mix of principles that found their way into disestablishment doctrine and other principles that are inimical to it. Though they certainly did not institute a system of religious liberty that fostered diversity, they did lay important groundwork for a new relationship between church and state.

2. The Presbyterians: No Religion Should Be Preferred Over Another

[69] *Id.* at 464 (quoting Roger Williams).
[70] Hall, *supra* note 14, at 464-65.
[71] *Id.* (emphasis in original).

> 'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents.[72]

In their native Scotland, the Presbyterians were members of the officially established and powerful church, but when they landed in America, they dominated no colony, or later, state. The Presbyterians' contribution to disestablishment principles arose from their experiences as dissenters from the established Anglican Church in some states. They became advocates of the principle of nonpreferentialism—that government may not treat one religion better than others.

In South Carolina, where the Anglican Church was established, dissenter William Tennent, an influential Presbyterian, rejected any religious establishment, and advocated tolerance. Without the political power to institute their religion as the state's religion, the Presbyterian Church came to view establishment itself as wrong. The evil lay in the government demand that religious believers financially support institutions that did not share their beliefs. Tennent described the inequalities in the law at the time:

> The law, by incorporating the one Church, enables it to hold estates, and to sue for rights; the law does not enable the others to hold any religious property, not even the pittances which are bestowed by the hand of charity for their support. No dissenting Church can hold or sue for their own property at common law. They are obliged therefore to deposit it in the Hands of Trustees, to be held by them as their own private property, and to lie at their mercy. The consequence of this is, that too often their funds for the support of religious worship, get into bad hands, and become either alienated from their proper use, or must be recovered at the expense of a suit in chancery.[73]

---

[72] Bd. of Educ. v. Grumet, 512 U.S. 687, 696 (1994) (quoting Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-793 (1973)).

[73] William Tennent**,** On the Dissenting Petition: Delivered in the House of Assembly, Charles-Town, South Carolina, Jan. 11, 1777 (Charleston 1777), *quoted in* Phillip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property*, 12 J. CONTEMP. LEGAL ISSUES 693 (2002).

He instead advocated a rule against government preference for any one religion, which is to say that he would not have abolished the tax so much as spread it through a number of religions. While this was a large step from the Massachusetts establishment, he did not carry the principle he introduced to its logical extreme. His views only extended to Protestants.[74] Still, Tennent advocated an important principle that was as applicable to the Anglican Church in his state as it was to the established Congregationalist Church in Massachusetts, and that is that a state tax flowing to one religion is an intolerable burden on those whose religious beliefs are different.[75]

When a Virginia state tax for the benefit of the Anglican Church was proposed, the Hanover Presbyterian clergy first supported it on the theory that it could be expanded to include them, a view not inconsistent with Tennent's. James Madison, who was adamantly opposed to any assessment, described the Presbyterians at that time as "ready to set up an establishment which is to take them in as they were to pull down that which shut them out."[76] Virginia Presbyterians eventually, however, opposed the assessment on the ground that it forced believers to support churches with views opposed to their own. They thought that government should not be able to choose "what sect of Christians are most Orthodox"; nor should it be able to force Jews to support the Christian religion.[77]

---

[74] LEVY, *supra* note 12, at 5-6.

[75] That same principle would be repeated by James Madison in the Memorial and Remonstrance, who argued that no believer should be forced by government to financially support any other religious institution and further that such support was dangerous to the established church as well. JAMES MADISON, *Memorial and Remonstrance against Religious Assessments*, *in* VIII THE PAPERS OF JAMES MADISON 298-304 (Robert A. Rutland et al. eds., 1973) 1785.

[76] Letter from James Madison to James Monroe, Apr. 12, 1785, *in* VIII THE PAPERS OF JAMES MADISON, *supra* note 33, at 261.

[77] THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 145 (1986). As Professor Douglas Laycock points out in his Article for this Symposium Issue, Presbyterians also eventually rejected state aid to religion altogether, supporting the no-aid principle. **Editor: ND cite**

In a similar vein, the Rev. John Witherspoon, President of the Presbyterian College of New Jersey, taught that the civil magistrates should not coerce citizens to believe any particular faith.[78] At the same time, he believed that statesmen should encourage religion by their example. Thus, a belief in government neutrality toward religion ran through the Presbyterians' various and sometimes conflicting political positions. Indeed, the same principle could be used to support multiple establishments and nonestablishment.

The Presbyterians thus contributed to the development of the disestablishment's now fully developed doctrine that government may not prefer one religion over another reflected in *Wallace v. Jaffree*[79] and *School District of Abington Township v. Schempp*.[80]

The Calvinists, therefore, introduced independent functions for church and state and the principle that the state must be nonpreferential between religions via the Presbyterians, via the Presbyterians. Each of these principles is a fundamental element in Establishment Clause jurisprudence today.

B. The Baptists: The Right to Believe According to One's Own Conscience

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[81]

Many Baptists in the United States are quite proud of their contributions to the separation of church and state, and believe it is crucial to religious liberty. Two of the

[78] ADAMS & EMMERICH, *supra note 10*, at 30.
[79] 472 U.S. 38 (1985).
[80] 374 U.S. 203 (1968).
[81] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

most important contributors were the Rev. Isaac Backus and John Leland. The Rev. Isaac Backus was born a Congregationalist in Norwich, Connecticut, but in 1751, he converted to the Baptist faith as part of the Great Awakening, later becoming a gadfly to the Congregationalists, which they did not appreciate.[82] His incessant prodding of the Congregationalist establishment in Massachusetts set the stage for the end of establishment there in 1833.[83] Along with Leland, he believed that Baptist theology mandated the freedom to believe. Leland took it one step further and declared that "[t]he notion of a Christian commonwealth should be exploded forever."[84] On Leland's terms, religious establishments were "all of them, anti-Christocracies."[85]

In the face of the entrenched Congregationalist establishment, the Baptists won limited concessions over the years. They were granted state legislative exemption from having to support the established church**,** along with Quakers and Anglicans, but the Congregationalists did not honor the exemption and insisted they pay.[86] They then petitioned King George III for relief, which he granted on July 31, 1771.[87] Once again, the legal relief did not result in actual relief from the Congregationalists' tax collectors. Positive law could not protect them from the political will of the Congregationalists. The Baptists then turned to civil disobedience. In *An Appeal to the Public for Religious Liberty*, Backus analogized the Massachusetts tax on faith to the British tax on tea that

---

[82] Andrew Eliot wrote of Backus that, "Our Baptist brethren all at once complain of grievous persecutions in Massachusetts! These complaints were never heard of till we saw them in public prints. It was a great surprise when we saw them, as we had not heard that the laws in force were not satisfactory." Bailyn, at 263-64.
[83] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 261-67 (1967); WITTE, *supra* note XX, at 28-31.
[84] *Id.* at 29 (quoting John Leland).
[85] LEVY, *supra* note 12, at 136.
[86] *See* BAILYN at 262-63.
[87] *See Id.* at 265-66; ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-1789, at 118 (William G. McLoughlin ed., 1968) [hereinafter PAMPHLETS].

would spark the Revolution – it was intolerable, unfair, and effected through illegal means.[88] Therefore, they should not obey.

For Backus, the twin principles of toleration and disestablishment were derived not from social theory, but rather from God. He explained that the secular law might be needed to institute and retain civil society, but "in ecclesiastical affairs we are most solemnly warned not to be subject to ordinances after the doctrines and commandments of men."[89] Like the Quakers, he argued in 1773 that governmental coercion of religious belief did not produce true believers, but rather hypocrites, and made a point that James Madison made in his famous *Memorial and Remonstrance* thirteen years later, that God had no need of the civil authorities to shore up his power.[90] Indeed, it was his view that when government supported clergy, the result was corruption.

Leading up to the Revolution, Backus, along with other Baptist representatives, petitioned members of the Continental Congress to disestablish Massachusetts, and then the Massachusetts Provisional Congress, and the Massachusetts General Assembly, all to no avail. Upon being accused of rending the fabric of Massachusetts society, Backus authored *Government and Liberty Described*, which showed the patent inconsistency between the Congregationalist's position against an Anglican establishment and their own establishment in opposition to the Baptists. He invoked the familiar theme of "no taxation without representation."[91] In a later pamphlet, Backus argued that it was absurd to accord the freedom to chose one's own doctor or lawyer, but forbid the freedom to

---

[88] Isaac Backus, *An Appeal to the Public for Religious Liberty Against the Oppressions of the Present Day*, PAMPHLETS, *supra* note 44, at 313.
[89] *Id.* (emphasis deleted).
[90] *Memorial and Remonstrance*, *supra* note 34, at 302 (paragraph 6).
[91] *See* PAMPHLETS, *supra* note XX, at 345-366.

choose one's own cleric. He advocated in the strongest possible terms an expansive freedom to choose one's own religious beliefs:

> 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. And civil rulers are so far from having any right to empower any person or persons to judge for others in such affairs, and to enforce their judgements with the sword, that their power ought to be exerted to protect all persons and societies, within their jurisdiction, from being injured or interrupted in the free enjoyment of this right, under any pretence whatsoever.[92]

In his final entreaty for an expansive right of belief that would have precluded the single establishment in Massachusetts, Backus also chastised his fellow citizens for not following God's word, saying, "Our fathers came to this land for purity and liberty in their worship of God, but how many have drawn their swords against each other about the affairs of worldly gain, whereby an exceeding dark cloud is brought over us. Instead of being the light of the world and the pillar and ground of the truth, as those are that obey Him who is the fountain of light and love, what a stumbling-block are we to other nations, who have their eyes fixed upon us?"[93]

Not until 1833, though, when the Massachusetts establishment formally ended, did the Baptists get out from under the state tax on all religions for the benefit of the Congregationalists. Yet, in the final analysis, Backus's dogged insistence in the 1760s and 1770s, that there be a right of conscience was a significant step toward the disestablishment (and free exercise) principle recognized today that government may not dictate religious belief.

---

[92] *Id.* at 416.
[93] *Id*. at 443.

Baptist pastor John Leland, an eloquent and forceful proponent of the freedom of conscience as well as the separation of church and state, was the only man to oppose establishments in Massachusetts, Virginia, and Connecticut. For him, America was not a "Christian nation," but rather should recognize the equality of all believers, whether pagan, atheist, Deist, Muslim, Jew, Catholic, or Protestant.[94] He proposed an amendment to the Massachusetts constitution in 1794 that would have ended even nonpreferentialism, because of the "evils . . . occasioned in the world by religious establishments, and to keep up the proper distinction between religion and politics."[95]

Neither Backus's nor Leland's views were fully realized even by Baptists within Massachusetts, but their persistent and impassioned arguments that Baptist theology demanded the freedom of conscience would pave the way for the later principle that government must accord citizens an expansive, in fact absolute, right of conscience.[96]

C. The Quaker Contribution: The Non-Coercion Principle

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'[97]

Quaker theology may have been dramatically different from other Reformation denominations, but certain of its central ideas have become staples in the United States' republican democracy. The Society of Friends' founder and leader for nearly 50 years

---

[94] LEVY, *supra* note 12, at 136.
[95] LEVY, *supra* note 12 at 137.
[96] Barnette, 319 U.S. at 642; *see also, e.g.,* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) *(*"Thus the Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").
[97] Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

was George Fox. Fox was raised a Puritan, but as a young man he found himself in searching for the "right" answer amongst the competing Reformation denominations. In coming to his own conclusions, he developed a form of Christianity that centered not on church or crown, priest or king, but instead focused on the common worshipper.[98] By 1650, the Religious Society of Friends was established.[99]

For Fox, true Christianity was not necessarily found in a church. To Fox, "God, who made the world, did not dwell in temples made with hands, . . .but in people's hearts. . .his people were his temple and he dwelt in them."[100] People could worship wherever they were. He extrapolated the anticlericalism principle undergirding the Reformation to its natural endpoint: for him, there was no need for an ordained minister or priest. Fox believed that "being bred at Oxford or Cambridge was not enough to fit and qualify men to be ministers of Christ."[101] Quakers rejected the concept of clergy, believing instead "that God, through the Holy Spirit, could move anyone to speak, that all Christians could and should be ministers."[102]

Fox called this experience the Light of Christ, and believed that "all people had within them a certain measure of the Light of Christ. . . .Pagans who had no knowledge of the historical Jesus could still experience the Inward Light of Christ, and, if obedient to it, could be saved without ever having heard Christian preaching or knowing the Bible."[103] The idea that one could be saved without receiving the sacraments led Quakers

[98] HAMM, *supra* note XX, at 15-16.
[99] *Id.* at 17.
[100] *Id.* at 16 (quoting George Fox).
[101] *Id.*
[102] *Id.* at 21
[103] *Id.* at 15.

to view all people as at least potential Christians, and toleration became a trademark Quaker characteristic.[104]

Quaker beliefs challenged the social order at its foundation. For example, women played an important role in Quaker society, because everyone was possessed with the Light of Christ, and, therefore, "women as well as men might be chosen by God to be ministers or elders."[105] Quaker worship was equally revolutionary. Quakers had no official ministers and did not take the sacraments.[106] Some of the practice that have become most closely associated with the Quakers, e.g., the refusal to take oaths and pacifism, came from a literal reading of the Bible.[107]

The Quakers made what came to be their most influential convert in Ireland in 1667. William Penn was an Oxford educated aristocrat, whose father was an admiral during the British Commonwealth (1648-1658), but became a supporter of King Charles II after the Restoration.[108] In 1681, King Charles granted William Penn the tract of land that would become Pennsylvania, in forgiveness for a debt to Penn's father.[109] Penn, as sole proprietor of the colony, had the freedom to govern in any way he saw fit. He set up

---

[104] Quakers in the colonies were well known for their tolerance and fair dealing with all people. They enjoyed peaceful relations with Native Americans from their first settlements in the colonies. MARGARET HOPE BACON, THE QUIET REBELS: THE STORY OF THE QUAKERS IN AMERICA 47 (1999).

[105] *Id.* at 21; *see also* HAMM, *supra* note XX, at 18-19 (describing "the centrality of women in the Quaker movement."). In its early stages, the equality of women had limits. Women and men always worshipped together, but separate women's "business meetings" were set up to encourage women to participate, as they were frequently silent when they attended business meetings with men. At first, the women's meetings were subordinate, but as soon as the nineteenth century, they gained equality and were eventually merged into the men's meetings. *Id.* at 21-22.

[106] HAMM, *supra* note XX, at 21 (describing the Quaker belief that the sacraments "were purely spiritual. Thus Quakers did not take communion with wine and bread, nor did they Baptize with water.").

[107] *Id.* at 22. The refusal to take oaths comes from the Quaker reading of the book of Matthew, where Jesus warns, "Swear not at all." "Fox and other Friends also read the New Testament as forbidding Christians to fight." *Id.*

[108] HAMM, *supra* note, XX at 26.

[109] BACON, *supra* note XX, at 54-55.

the colony according to Quaker principles and dubbed it the "Holy Experiment."[110] Penn's *Frame of Government*, influenced by John Locke and Algernon Sidney, who were friends, became an example of religious freedom for the Framers and others around the world.[111]

Penn first drafted his Frame of Government in 1682. It provided:

> That all persons living in this province, who confess and acknowledge the one Almighty and eternal God, to be the Creator, Upholder and Ruler of the world; and that hold themselves obliged in conscience to live peaceably and justly in civil society, 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.[112]

Even with such broad language, the new colony encountered problems, and Penn altered the document several times over the next years, until he finally added a "Charter of Privileges" in 1701 with specific protections for the civil liberties.[113]

---

[110] Penn wrote:

> I was drawn inward to looke to [the lord], & to owe it to his hand & powr then to any other way. I have obtained it & desire that I may not be unworthy of his love, but do that w^{ch} may answear his Kind providence & serve his truth & people; that an example may be Sett up to the nations. There may be room there [in Pennsylvania], tho not here [in England], for such an holy experiment.

William Penn, No. 37, Letter to James Harrison (Aug. 25, 1681), *in* 2 THE PAPERS OF WILLIAM PENN 107-8 (Richard S. Dunn & Mary Maples Dunn eds., 1982).

[111] BACON, *supra* note XX, at 55-56; HAMM, *supra* note XX, at 28.

[112] William Penn, Pennsylvania Charter of Liberty, Laws Agreed Upon in England, etc., THE FOUNDER'S CONSTITUTION vol. 5, at http://press-pubs.uchicago.edu/founders/documents/amendI_religions9.html (last visited Jan. 24, 2006).

[113] *See* LAMBERT, *supra* note XX, at 108 ("Anglicans in the colony had complained that the Quaker-dominated legislature had restricted religious liberty by lengthening the residency requirement for Anglicans to vote or hold office.").

The Charter was amended to read:

"BECAUSE no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship. . . I do hereby grant and declare, That no Person or Persons, inhabiting in this Province or Territories, who shall confess and acknowledge One almighty God, the Creator, Upholder and Ruler of the World; and profess him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their religious Persuasion." William Penn, Pennsylvania Charter of Privileges (1701), *available at* http://www.constitution.org/bcp/penncharpriv.htm (last visited Jan. 24, 2006).

William Penn "stressed that coercion of conscience destroyed authentic religious experience and 'directly invade[d] the divine prerogative.'"[114] For the Quaker, no man "hath power or authority to rule over men's consciences in religious matters," nor shall any citizen be "in the least punished or hurt, either in person, estate, or priviledge, for the sake of his opinion, judgment, faith or worship towards God in matters of religion."[115] Thus, the Quaker perspective valued freedom of conscience, because oppression was no path to true religious experience. The teleology, therefore, remained theocentric, but the goals of the theocentric state required the state to permit individuals to choose their own religious beliefs – a radically different proposition than the Congregationalists set forth.[116] The principle of non-coercion that is now a staple in the United States' disestablishment doctrine owes at least some of its heritage to the Quakers.

This value of tolerance was quite evident when Quaker Benjamin Franklin established what would become the University of Pennsylvania as a nonsectarian institution. No other major university of the day was founded on the same principles. For example, Harvard University was founded by Congregationalists, Yale University was Congregational, and the College of William and Mary was Anglican.
The Pennsylvania Assembly also did not recognize feast or fast days, and election sermons were devoid of talk concerning the either the colony's political or religious significance.[117] Even more unusual was Pennsylvania's willingness to permit religious

[114] ADAMS & EMMERICH, *supra* note *10* (quoting William Penn, The Great Case of Liberty of Conscience (London 1670)).
[115] *Id.* (quoting Penn's Concessions and Agreements of West New Jersey 1677).
[116] See supra
[117] J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA 26, 28 (Cambridge 1990).

communities to operate independently of the state, which led some to alter "basic institutions, including private property."[118]

It must still be said that the Quaker contribution was not wholly untainted by principles that are now at odds with the doctrine. Quakers made Christianity a prerequisite for public office, a rule plainly forbidden in the Constitution.[119] Today it is unconstitutional to require any particular faith as a prerequisite to public participation, but the Quakers did not take their tolerance to this level. Only Christians could vote, labor on the Sabbath was prohibited, and Quaker values were invoked to outlaw sexual offenses, rude language, and a view that there needed to be shared moral values.[120] Even so, the Quakers set in motion a principle that became a mainstay in Establishment Clause jurisprudence: the government may not coerce citizens to believe what they are unwilling to believe.[121]

D. The Roman Catholics and the Demands of Republicanism

> [It] is wrong when [a religious organization] asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. But this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes.[122]

---

[118] *Id.* at 5.
[119] U.S. CONST. Art. VI ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, 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.").
[120] ADAMS & EMMERICH, *supra* note *10*, at 6-7 (quoting Pennsylvania Frame of Government of 1682, Laws Agreed Upon in England (1682)).
[121] *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that."); School Dist. v. Schempp, 374 U.S. 203, 221 (1963).
[122] General Council on Fin. & Admin. v. Cal. Superior Court, 439 U.S. 1369, 1372 (Rehnquist, Cir. J.).

The Catholic experience in the English colonies was, even more than other minority religions, dependent largely on the fortunes of their counterparts at home.[123] During the reigns of James I and Charles I, conditions in England were somewhat relaxed and there was a revival of Catholicism. In this environment, Lord George Calvert, following a career in government service, converted to Catholicism.[124] Calvert, a wealthy man who held the title of Baron of Baltimore, was first given a charter for a colony in Newfoundland, which he abandoned due to the financial and physical hardships of the location. Just before his death in 1632, however, Calvert was able to secure from the King Charles another colony, in the more hospitable land just north of Virginia, which he named "Maryland," for the Catholic King's wife.[125]

The grant, like William Penn's, was for a sole proprietorship, and passed after Calvert's death to his son, Cecil. Cecil's priority in establishing Maryland was mainly to establish a profitable commercial center. Unlike Penn, Calvert did not view Maryland as a bastion for religious toleration. Rather, religious toleration as the only way to ensure the commercial success of the venture.[126] The first settlers of the colony in 1634 included sixteen mostly Catholic gentlemen and three Jesuit priests, but the majority of those who made the voyage were the Protestant servants of these men.[127]

In order to placate the fears of the Protestant settlers of a "Catholic" colony, Calvert ensured, through his instructions to the governor, that religious toleration would

---

[123] There were, of course, other colonial establishments in the new world where Catholicism flourished. In the cases of the Spanish and French colonies in North America, Catholics did not fear religious persecution as they did in the English colonies, because Catholicism was the established religion of both Spain and France at the time of their conquests. *See generally*, DOLAN, *supra* note XX, at 15-42.
[124] It is likely that Calvert was born a Catholic, and converted to the Anglican Church with his parents at a young age. *Id.* at 71.
[125] *Id.* at 72.
[126] *Id.*
[127] *Id.*

be the order of the day. As one historian summarizes, "[t]hese instructions clearly indicated the mind of Cecil Calvert regarding the place of religion in colonial Maryland. Since civil harmony was the primary consideration, religion was to remain a private affair, neither shaping the destiny of the colony not impeding its progress."[128] Eventually, these instructions were codified by the Maryland Assembly.

In 1639, the Assembly passed legislation guaranteeing "that the 'Holy Churches within this province shall have all their rights and liberties.'"[129] Ten years later, the Assembly enacted the Act Concerning Religion, which provided that

> noe person or persons whatsoever within this Province, or the Islands, Ports, Harbors, Creekes, or havens thereunto belonging professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof within this Province or the Islands thereunto belonging nor any way compelled to the beleife or exercise of any other Religion against his or her consent, soe as they be not unfaithfull to the Lord Proprietary, or molest or conspire against the civill Governemt. established or to bee established in this Province vnder him or his heires.[130]

Like Pennsylvania, Maryland's laws provided protection for all Christians, regardless of denomination.[131] But concern for free exercise ended when it interfered with the duly enacted laws of the civil government.

Despite the good intentions, there were problems nonetheless, and from both sides. Some Catholics, especially the Jesuits, wanted the same types of privileges that

---

[128] *Id.* at 74. Calvert wrote:

> His Lo^{pp} requires his said Governor and Commissioners th^{t} in their voyage to Mary Land they be very carefull to preserve unity and peace amongst all the passengers on Shipp-board, and that they suffer no scandal nor offence to be given to any of the Protestants, . . . and that for that end, they cause all Acts of Romane Catholique Religion to be done as privately as may be, and that they instruct all Romane Catholiques to be silent upon all occasions of discourse concerning matters of Religion; and that the said Governor and Commissioners treat the Protestants wth as much mildness and favor as Justice will permit.

Id. (quoting NARRATIVES OF EARLY MARYLAND 1633-1684, at 16 (1910)).

[129] *Id.* at 76.

[130] *Maryland Act Concerning Religion*, *in* THE FOUNDER'S CONSTITUTION vol. 5, at http://press-pubs.uchicago.edu/founders/documents/amendI_religions5.html (last visited Jan. 23, 2006).

[131] The Act makes blasphemy against all manner of Christian belief, and includes provisions that would allay the concerns of both Protestants (e.g., the Holy Trinity) and Catholics (e.g., the Virgin Mary). *See id.*

established churches enjoyed in Europe. They lobbied Calvert for various exemptions from the civil law, including from taxation, but he steadfastly refused.[132] Likewise, the Protestant majority occasionally asserted itself, especially when conditions in England were favorable. Calvert managed to regain control after rebellions in 1645-47 and 1654-58, during which time Puritan regimes ruled the colony.[133] Ultimately, however, control of Maryland was seized from Calvert and it was established as an Anglican colony in 1692, just a few short years after the Glorious Revolution of William and Mary in England.[134]

It should come as no surprise then, that after enjoying more religious freedom in Maryland than in any other colony, and subsequently losing their right to free exercise under Anglican rule, that Catholics were vocal supporters of the American Revolution. In particular, Charles Carroll, son of a prominent Catholic family in Annapolis, argued the cause for independence in a series of newspaper debates under the pseudonym "First Citizen."[135] Carroll was a member of the first Continental Congress, and a signer of the Declaration of Independence. According to George Washington, Catholics did their "patriotic part," and united with Protestant revolutionaries to achieve independence from Britain.[136]

---

[132] DOLAN, *supra* note XX, at 78. It appears that Calvert was most concerned with the public good in refusing the Catholic demands for exemptions over a period of ten years. "After more than a decade of bitter wrangling, the Jesuits gave in and tacitly accepted the authority of Calvert." *Id.* at 79.
[133] *Id.* at 75.
[134] *Id.*
[135] *Id.* at 97. Carroll's debates were with Daniel Dulany, who dubbed himself "Antilon," and wrote "in support of the governor's right to impose fees related to the official inspection of tobacco." *Id.* at 96. The debate eventually escalated to more global issues, with Carroll urging a natural rights agenda. *Id.* at 96-97.
[136] *Id.* at 97.

As part of the framing generation, Catholics served as "members of Congress, assemblies, and [held] civil and military posts as well as others."[137] Freedom being contagious, beginning in the 1780's there was a move on the part of "American Catholics to be free and independent from all foreign influence or jurisdiction. . . .be it English or Roman."[138] There were struggles within the Church "to adapt the European Catholic Church to American culture by identifying that church with American republicanism."[139] External forces, however, would hamper this movement. In 1810, Rome asserted its preeminence on American clergy and forbade the celebration of Mass in English.[140] Coupled with this, in 1820, a wave of mostly poor and uneducated Catholic immigrants, including Irish, Germans, Italians and Poles, began to arrive in America and stirred old prejudices, especially regarding the Catholics' ability to effectively assimilate in a republican democracy.[141]

After this wave of Catholic immigration began, anti-papism, or anti-Roman Catholicism, was revived. By then, there was a plethora of Protestant denominations and, after a century of having the Constitution in place, a well-developed respect for the inherent values of a democratic republican form of government. The former demanded toleration while the latter was counter to a monarchical, or nondemocratic hierarchical form of governance. These two values came into conflict when it came to Roman Catholics, as they demanded toleration and acceptance but the Protestant majority held an abiding distrust of the Catholic governing structure, which was the premiere example of a

[137] *Id.* at 101-02 (quoting I THE JOHN CARROLL PAPERS 160 (1976)).
[138] *Id.* at 105-06.
[139] Patrick Carey, *The Laity's Understanding of the Trustee System 1785-1855*, 64 CATH. HIST. REV. 358 (1978).
[140] DOLAN, *supra* note XX, at 124.
[141] *See generally id.* at 127-57.

top-down hierarchy with all of the pomp and demands for allegiance over its subjects as European monarchy. In this case, fears of a theology and religious organization's system (Roman Catholicism) led to an affirmation of the core principles of the Constitution and, as a result, the separation of church and state by both those who were fearful and the belie0vers themselves.

It would not be fair to tag most late nineteenth-century Protestants as rabid anti-Catholics, though some were. Most were, however, tolerant of individual Catholics while remaining deeply and suspiciously anti-papist. They saw in papism the opposite of what was required for a man to be able to choose his representatives. In their eyes, it was anti-individualist and dangerous to think that a group of Americans would take their political orders from the Pope in Rome. The fear, to put it bluntly, was that Catholics would be automatons for the Pope and therefore unequal to the task of democratic governance. Thus, some even suggested denying Catholics the vote.[142] The Protestants' shared belief in tolerance and independence from hierarchy led them to hope not that the Catholic Church would be abolished, but rather that it would become the American Catholic Church, with members animated by these public values.

One of the chief examples of this movement lay in the short-lived New York law that forbade bishops, as opposed to laymen, from owning church property.[143] While the American laypeople presumably could be trusted to hold the property for American uses, they feared that the bishops, who had been trained in Rome and many of whom still seemed more a part of the Vatican than America, would turn American property into Rome's.

---

[142] Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property*, 12 J. CONTEMP. LEGAL ISSUES 693, 705 (2002).
[143] *Id.* at 719-23.

Professor Philip Hamburger has made the rather nice point that this shows how the liberal value of tolerance could in fact become intolerance.[144] But it also shows how the American notion of disestablishment has fostered simultaneously an unbelievably diverse collection of religions along with the separation of a citizen's public and religious roles. Catholics did not, in the end, look to Rome to make their political decisions in the United States, and the working out of that principle was most fully realized when President John F. Kennedy, the first Catholic President, said, "Whatever issue may come before me as President . . . I will make my decision in accordance with these views, in accordance with what my conscience tells me to be the national interest, and without regard to outside religious pressures or dictates."[145]

The Protestants' concerns, therefore, were eventually allayed. The dispute, or debate, however, brought to the fore the radical privatization of religion in the United States, as compared to the established religions in Europe. Not only does religion not dictate public policy, but its operation may not interfere with the underpinnings of democratic republicanism: individual political decisionmaking and a willingness to debate public issues beyond the bounds set by any particular religious viewpoint. The Protestants who distrusted Catholics had assumed that the Catholics would conflate the religious and the secular, and therefore undermine the most basic political values, but ultimately they did not.

It was conceivable that American Catholics might have looked to Rome for guidance and even direction on political issues. But in the main, they have been every bit as "American" as the Protestants, which means that they have exercised independent

---

[144] *See generally id.*
[145] Senator John F. Kennedy, Address to the Greater Houston Ministerial Association (Sept. 12, 1960), *available at* http://www.jfklibrary.org/j091260.htm (last visited Jan. 21, 2005).

judgment regarding whom to choose for public office and what public policies to support. The distinction between church governance and civil governance has become pronounced as the vast majority of American Catholics have rejected the public policy teachings of the Vatican, even as they have followed its religious beliefs.[146] In that sense, American Catholics have been "Protestantized." But they have not had to abandon their faith, or the religious organization of their fellow believers, to be full citizens. President Kennedy put the point rather forcefully:

> I believe in an America that is officially neither Catholic, Protestant nor Jewish--where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source--where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials--and where religious liberty is so indivisible that an act against one church is treated as an act against all.[147]

Toleration, therefore, won out, as President Kennedy was elected the first Roman Catholic President of the United States. But that toleration was accorded only after it became clear that Catholics would be intensely constructive and independent contributors to the political culture as well as the free market economy. Thus, disestablishment in the United States has been one of the structural elements of the Constitution that reinforce democratic republican principles.

---

[146] A National Catholic Reporter survey found that 72% of American Catholics believe that one can be a devoted member of the Church while disobeying its teachings on birth control. *See The Facts Tell the Story: Catholics and Contraception, at* http://www.catholicsforchoice.org/nobandwidth/English/youthfacts.htm (last visited Jan. 23, 2005). In addition, the Pew Forum on Religion and Public Life found that 35% of Catholics in the United States support the legalization of gay marriage, three percentage points higher than the American population as a whole. *See Religious Beliefs Underpin Opposition to Homosexuality* (released Nov. 18, 2003), *available at* http://pewforum.org/publications/surveys/religion-homosexuality.pdf (last visited Jan. 22, 2005). Fifty-one percent of white Catholics support federal funding for stem cell research, despite Vatican assertions that such research is immoral. *See Public Makes Distinctions on Genetic Research* (released April 9, 2002), *available at* http://pewforum.org/publications/surveys/bioethics.pdf (last visited Jan. 22, 2005).

[147] *See* Kennedy, *supra* note 4.

At times, it seems that American Catholics are being pulled in two directions. On the one hand, they are members of their church, which ascribes certain collective beliefs to them. Indeed, Catholics have long been seen as having more than one mind on central social issues.[148] Pope John Paul II once said,

> It is sometimes reported that a large number of Catholics today do not adhere to the teaching of the church on a number of questions, notably sexual and conjugal morality, divorce and remarriage. . . .It is sometimes claimed that dissent from the magisterium is totally compatible with being a good Catholic and poses no obstacle to the reception of the sacraments. This is a grave error.[149]

He was referring to the phenomenon of "cafeteria Catholics" – people who identify themselves as Catholic, but do not necessarily believe in various tenets of the Church. In fact, Catholics have become so diverse, embracing the principles of republicanism, that they can no longer be pigeon-holed by the dogma of Rome. For instance, One Gallup Poll reported that, "78 percent of American Catholics support allowing Catholics to use birth control, 63 percent think priests should be able to marry, and 55 percent think women should be ordained as priests. [Another] reported that more Catholics than non-Catholics believe that homosexual behavior, divorce, and stem-cell and human-embryo research are morally acceptable." [150]

The shift was accentuated by President Kennedy, whose version of toleration is reflected in the Establishment Clause and the Free Exercise Clause, which hold the one

---

[148] See Joseph Bottum, *Alito and the Catholics*, WEEKLY STANDARD, Jan. 23, 2006; David Brooks, *Losing the Alitos*, N.Y. TIMES, Jan. 12, 2006, at A6.

[149] John Dart & Robert W. Stewart, *Pope Tells Bishops Dissent On Doctrine Is Grave Error; Talk Most Significant of His Tour*, L.A. TIMES, Sept. 16, 1987, at 1.

[150] Katy Kelly & Linda Kulman, *A Feisty But Loyal Flock*, U.S. NEWS & WORLD REPORT, Apr. 18, 2005, at 30; *see also* Bottum, *supra* note XXX (noting that "there are millions of Catholic voters--nominal Catholics, cultural Catholics, cafeteria Catholics, suburban Catholics, soccer-mom Catholics, and many others--who seem unmoved by their coreligionists' struggle against abortion. One quarter of the nation's population identifies itself as Catholic, but probably less than half of those 65 million people are clearly and strongly pro-life. Perhaps only a tenth of them vote strictly on the issue of abortion.").

and only absolute rule in the Constitution: Americans may believe absolutely anything they choose.[151] But it is not a toleration of all conduct -- which may be governed in light of the public good. The history of anti-papism illustrates how the American system did not, in the end, require Catholics to abandon their religious beliefs, but it did force them to adjust their political conduct to publicly embrace the core values of republicanism that demand political decisions be made according to individual conscience and not dictated by a religious leader. This means, ironically, that the separation of church and state in the United States requires intolerance of theocratic beliefs and conduct. More importantly, it means that disestablishment is republicanism-reinforcing.[152]

IV. Conclusion

The religious history of the Establishment Clause is like a fine diamond – there are many facets and many flashes of light, but no one will ever know precisely all of the forces that led to it. No one religion can claim to have led the United States ineluctably to the separation of church and state, but many may take at least partial credit for the outcome. This complex concept required a non-homogeneous religious population, many of whom were driven to the United States due to religious persecution in Europe, and the culling of key principles from one tradition after another. This Article has pointed to the religious influences that planted seeds later to blossom into the following core

[151] *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 877 (1990); Gillette v. United States, 401 U.S. 437, 462 (1971); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Reynolds v. United States, 98 U.S. 145, 166 (1879).

[152] *See* Romer v. Evans, 517 U.S. 620, 647-48 (1996) ("The Establishment Clause of the First Amendment prevents theocrats from having their way by converting their fellow citizens at the local, state, or federal statutory level; as does the Republican Form of Government Clause prevent monarchists."). *See generally* Jones v. Wolf, 443 U.S. 595 (1979); Larkin v. Grendel's Den, 459 U.S. 116 (1982); Bd. of Educ. v. Grumet, 512 U.S. 687 (U.S. 1994).

disestablishment principles: (1) church and state are functionally distinct[153] (the Congregationalists); (2) government may not prefer any religion over any other[154] (the Presbyterians); (3) government may not coerce believers into any religious belief[155] (the Baptists); (4) the government must be tolerant of all beliefs[156] (the Quakers); and (5) the believer may believe in a church order that is not like the civil order, but still can embrace the principles of democratic republicanism in the civil sphere[157] (the Roman Catholics).

The principles paved the way for a rather remarkable diversity among religious believers in the United States. With each wave of immigrants, the United States has embraced numerous and diverse religious groups. America is home to Muslims, Catholics, Jews, Protestants, Buddhists, Sikhs, Wiccans, atheists, humanists, and many others, who live as neighbors and fellow citizens.[158] While the system has had its growing pains, and has hardly been perfect, diversity has not led to division. Rather than developing through armed conflict, the disestablishment principles fostered by religious entities themselves have permitted church and state to prosper in peaceful coexistence.

Each era has its own formula for debating how best to balance the power of church and state in the society. In the contemporary United States, the sides have been characterized (or, actually, caricatured) as a war between secularists and believers, with

---

[153] *See, e.g.*, Bd. of Ed. v. Grumet, 512 U.S. 687, 698 (1994); Larkin v. Grendel's Den, 459 U.S. 116, 126-127 (1982).
[154] *See, e.g.*, Allegheny v. ACLU, 492 U.S. 573, 605 (1989).
[155] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992); *See also* Employment Div. v. Smith, 494 U.S. 872 (1990); Reynolds v. U.S., 98 U.S. 145 (1879).
[156] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
[157] Jones v. Wolf, 443 U.S. 595, (1979); McDaniel v. Paty, 435 U.S. 618 (1978); Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 U.S. 440 (1969); Watson v. Jones, 80 U.S. 679 (1871).
[158] *See generally* DIANA L. ECK, A NEW RELIGIOUS AMERICA 1-6 (2002); CUNY GRADUATE CENTER AMERICAN RELIGIOUS IDENTIFICATION SYSTEM, U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 67 (U.S. Dep't of Com. 2003).

the believers on the offense.[159] Take for example, this statement from the Rev. Jerry Falwell after the terrorist attacks on the World Trade Center:

> The abortionists have got to bear some burden for this because God will not be mocked... I believe that the pagans, and the abortionists, and the feminists, and the gays and the lesbians who are actively trying to make that an alternative lifestyle, the ACLU, People for the American Way--all of them trying to secularize America--I point the finger in their face and say, 'You helped this happen.'[160]

The message is that true believers are fighting for God while nonbelievers are trying to tear down the society.

Certain members of the Supreme Court have also adopted this reasoning. Former Chief Justice Rehnquist dissented in a school prayer case because, saying that he disagreed with its holding, but was even more disturbed that the tone of the opinion, which he thought "bristle[d] with hostility to all things religious in public life."[161] Justice Scalia has also lamented that, "[i]n an era when the Court is so quick to come to the aid of other disfavored groups, its indifference [to religion], which involves a form of discrimination to which the Constitution actually speaks, is exceptional."[162]

Professor Noah Feldman followed these fault lines in the society in his book, *Divided by God*, wherein he argued that peace under the Establishment Clause could be achieved if the so-called secularists **"**accept the fact that religious values form an important source of political beliefs and identities for the majority of Americans," and the evangelicals "acknowledge that separating the institutions of government from those of

---

[159] *See, e.g.*, (quoting Jerry Falwell after the September 11, 2001, World Trade Center attacks)
[160] Daniel Leavitas, *The Radical Right After 9/11: The Attacks Hardened the Resolve of Immigrant Bashers and Anti-Semites*, THE NATION, July 22, 2002, at 25; Mark I. Pinsky, *Legal Weapon*, L.A. TIMES, Sept. 22, 1993, at E1 (quoting Jay Sekulow, charging that, "public schools are being used to indoctrinate children in evolution, New Age philosophy and sexual amorality. . . . The penetration of secular humanism into our judicial and educational institutions has chased virtually every mention of Christianity out of many schools.").
[161] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting).
[162] Locke v. Davey, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting).

religion is essential for avoiding outright political-religious conflict."[163] Yet, taking the terms of the political debate, as they have been set by particular political players, obscures the facts. In truth, the United States debate over the separation of church and state is not between believers and nonbelievers. Rather, it is a debate between believers/nonbelievers and believers/nonbelievers. The camps cannot be distinguished by whether the one expressing an opinion is a religious believer. This should come as no surprise in a country where over 80% hold religious beliefs. In fact, in the United States, there are many religious believers who advocate and support disestablishment principles, even when they limit the power of religious entities to hold the reins of governing power.[164]

This Article shows why this last point should come as no surprise. To return to the epigraph, Carl Schmitt pointed out the connection between religious belief and political institutions. That principle is no less true with respect to the Establishment Clause. Whatever one thinks of any particular principle within the Establishment Clause's domain, and this Article takes no position on any single principle, it is a historical fact that present-day, fundamental disestablishment principles can be traced back to religious beliefs. Thus, it is not only simplistic, but also demonstrably false, to equate the disestablishment canon with an "anti-religious" perspective. Only when we obtain this firmer ground, where the debate is over principles and not religious status, can we then proceed to a reasoned critique of the principles themselves.

---

[163] NOAH FELDMAN, DIVIDED BY GOD 251 (2005).

[164] *See generally, e.g.*, JIM WALLIS, GOD'S POLITICS (2005); Rev. Barry W. Lynn, An Open Letter to Jerry Falwell (Dec. 2005), at http://www.au.org/site/PageServer?pagename=popup_falwell_xmasletter (last visited Jan. 30, 2006); Baptist Joint Committee for Religious Liberty, Religious Liberty Council Issue Guide: Advocating Religious Liberty in the Public Square, at http://www.bjcpa.org/resources/pubs/pub_rlcissueguide.pdf (last visited Jan. 30, 2005).