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The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory

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THE SEPARATION OF THE RELIGIOUS AND THE SECULAR: A FOUNDATIONAL CHALLENGE TO FIRST AMENDMENT THEORY

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I. INTRODUCTION

The First Amendment to the Constitution of the United States guarantees the free exercise of religion and prohibits the establishment of religion by government.¹ In dozens of cases decided in the past three decades, the Supreme Court, as the institution designated under the federal system to ultimately resolve these issues, has struggled to identify coherent principles of interpretation. The difficulties inherent in attempting to reconcile the prerogatives of individual belief with the majoritarian acts of governmental bodies have created a jurisprudence of complex, conflicting, and often undulating principles.

The emergence of a new kind of religious challenge has recently compounded the problems faced by the Court. In the past, free exercise and establishment challenges generally were posed by religious adherents seeking exemptions from oppressive majoritarian action or by nonreligious (or nonconforming religious) individuals seeking to strike down legislation that was

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

seen as advancing the cause of traditional religious groups. In both cases, the complaining parties accepted—indeed, advocated—the private nature of religious experience and sought its separation or protection from the public sphere. During the past few years, a new kind of claimant has emerged. Whether religious employers resisting the enforcement of state and municipal civil rights laws² or parents objecting to the establishment of “secular humanism” in the public schools,³ these claimants share a fundamental characteristic: they reject the assumption of the separation of the religious and the secular in society and in government. They contend instead that religious beliefs and values are an integral and inseparable part of all aspects of their lives. Although claimants with such views have certainly not been unknown in the Supreme Court,⁴ the recent public assertion of such claims by more traditional religious groups presents a new and difficult challenge for existing First Amendment jurisprudence. The implication of nonseparationist claims—that all state activity potentially involves Free Exercise

2. See, e.g., *Under 21 v. City of New York*, 482 N.E.2d 1 (N.Y. 1985) (objection by the Roman Catholic Church, Agudath Israel, and the Salvation Army to the enforcement of state and municipal civil rights laws prohibiting discrimination in employment on the basis of religion, sex, marital status, or affectional preference, as an infringement of the employers' rights to free religious exercise); *Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932 (6th Cir. 1985), *rev'd and remanded on other grounds*, 474 U.S. 978 (1986); *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), *dismissed for lack of juris.*, 478 U.S. 1015 (1986) (similar claims by fundamentalist Christian groups).

3. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (contention that a prescribed set of reading textbooks in the public schools contained acceptance of evolution, secular humanism, futuristic supernaturalism, and pacifism, in violation of the Free Exercise Clause), *cert. denied*, 484 U.S. 1066 (1988); *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939 (S.D. Ala.) (claim that “a man-centered belief-system, . . . [known] by the appellation ‘secular humanism,’ [was] promoted in the public schools to the detriment of [the complainant's] children's First Amendment right of free exercise, all in violation of the Establishment Clause”), *rev'd*, 827 F.2d 684 (11th Cir. 1987); see also *Crowley v. Smithsonian Inst.*, 636 F.2d 738 (D.C. Cir. 1980) (challenge to two exhibitions at the Smithsonian Museum of Natural History, on the ground that they established secular humanism in violation of Free Exercise and Establishment Clause guarantees).

4. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (Native Americans); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (Mormons); *Reynolds v. United States*, 98 U.S. 145 (1879) (Mormons).

or Establishment Clause guarantees—challenges the limits of First Amendment doctrine.

Nonseparationist claims present the most difficult challenge because they attack what I shall argue to be the deepest motivation and operating principle of existing First Amendment jurisprudence: the separation of the religious and the secular within the individual, in society, and in government. While acknowledging the pervasiveness of religious belief in many aspects of individual and collective life, the Court's majorities have assumed that such separation can be made—indeed, must be made—in determining the scope of First Amendment religious protections and prohibitions. This belief has been presented as something required by the history, purposes, and spirit of the Amendment; and it has, accordingly, been enshrined as the core, first principle of First Amendment jurisprudence.

The Supreme Court's attempt to separate the religious and the secular is not an aberrational response to twentieth-century society and political culture. It is part of a deeper strain in American politics and government that has gained momentum since the time of the Founding Era.⁵ What was originally attempted "disestablishment," or the removal of governmental support of religious institutions, became a model for deeper schism between the religious and the secular spheres of life. As secularism and religious individualism became important cultural forces, attitudes hardened toward the involvement of the religious in public life.⁶ Walter Berns expressed a not uncommon view when he listed the Ku Klux Klan, the Know-Nothing

5. The "Founding Era" for the purposes of this study will be understood to encompass, roughly, the period of 1770-1800. To the extent that individuals who were prominent during that period made later statements which bear directly upon these issues, those statements are included as well.

6. See generally PETER L. BERGER, *THE SACRED CANOPY* 1 (1967) ("Religion was no longer the 'sacred canopy,' investing the existing social order with sacred meaning."); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993) (describing general attitudes of hostility to religion in public life); CHRISTOPHER F. MOONEY, *PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION* 1-10 (1986) (same); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1059 (1990) (attributing the "privatization of religious identity" to the ascendance of Protestant theology).

Party, and the Jehovah's Witnesses as examples of groups who have combined religion and politics and who "have both manifested bigotry and been its victims." "[B]igotry sometimes manifests itself politically when given the opportunity and the occasion"⁷

Some have lived happily under this scheme. Secularists who view religion with suspicion and distrust consider its expungement from public life as a practical and highly desirable necessity. Some Protestant groups also have welcomed this development. For them, religion is a private matter, and members' primary concerns with personal salvation have little to do with the affairs of government. For other groups, the attempted compartmentalization of life into separate religious and secular spheres has created extraordinary difficulty and alienation. Those who believe in the "public church"—in the need for religiously-based responses to questions of social responsibility or the public good⁸—view the attempted delegitimization of religious beliefs and values in the public sphere with much bitterness, anger, and alienation from public institutions. John Courtney Murray, who has been called "the most important American Catholic thinker of the twentieth century,"⁹ reflects this sentiment when he attacks the Supreme Court's efforts toward privatization of religion as "an irredeemable piece of sectarian dogmatism . . . , a deistic version of fundamentalist Protestantism."¹⁰

7. WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 35 (1976). Berns expresses relief that "the history of the United States, especially on the national level, is marked by the absence of religious politics" *Id.*

8. See generally MARTIN E. MARTY, *THE PUBLIC CHURCH* (1981). These groups include Roman Catholics, evangelical and sectarian churches, some mainline Protestant groups, and many of those in the Jewish community. See EDWARD F. HUMPHREY, *NATIONALISM AND RELIGION IN AMERICA 1774-1789*, at 3 (1924); Levinson, *supra* note 6, at 1059-60 (discussing the comprehensive reach of many strands of Roman Catholic thought, and the reach of Traditional Judaism "from the bedroom to the public square").

9. WILLIAM L. MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 218 (1986).

10. John C. Murray, *Law or Prepossessions?*, 14 *LAW & CONTEMP. PROBS.* 23, 30 (1949); see also JOHN C. MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* at ix (1964) ("[A] Catholic . . . knows that the prin-

There is no doubt but that religion has "sanctified many cruelties."¹¹ There is also no doubt but that religious impulses have galvanized individual action and compelled social change throughout our history, from the anti-slavery campaigns of the eighteenth and nineteenth centuries to the Civil Rights movement of the 1960s.¹² For better or worse, religion has always been a powerful force in American history. As historian Henry May has observed, true religious skepticism has largely been confined to small groups of intellectuals; emotionally fervent and often theologically conservative religion has always been very prevalent and very powerful, particularly among the poor and the oppressed.¹³ The extraordinary degree of religiosity in American life, when compared to other Western cultures, has been documented many times.¹⁴ For many citizens, religion pro-

ciples of Catholic faith and morality stand superior to, and in control of, the whole order of civil life. The question is sometimes raised, whether Catholicism is compatible with American democracy. The question is invalid as well as impertinent; for the manner of its position inverts the order of values.").

11. MILLER, *supra* note 9, at 347.

12. See MOONEY, *supra* note 6, at 6 ("This was precisely the source of the Civil Rights movement of the 1960s: the ability of Martin Luther King, Jr., to draw upon and then to transform the personal spiritual experiences of so many Americans by his call to build a just society."); see also HUMPHREY, *supra* note 8, at 15 ("The Anti-slavery clauses of the Constitution may be attributed to the 'religious fanaticism' of Quakers, Methodists, Baptists, and various other church organizations.").

13. HENRY F. MAY, IDEAS, FAITHS AND FEELINGS: ESSAYS ON AMERICAN INTELLECTUAL AND RELIGIOUS HISTORY 1952-1982, at 136 (1983).

14. A recent study observed that:

Religion is one of the most important ways in which Americans "get involved" in the life of their community and society. Americans give more money and donate more time to religious bodies and religiously associated organizations than to all other voluntary associations put together. Some 40 percent of Americans attend religious services at least once a week . . . and religious membership is around 60 percent of the total population.

ROBERT N. BELLAH, ET AL., HABITS OF THE HEART 219 (1985). In a survey of residents of North Carolina taken in the 1970s, 74% agreed with the statement that "human rights come from God and not merely from laws." Phillip E. Hammond, *The Conditions for Civil Religion: A Comparison of the United States and Mexico*, in ROBERT N. BELLAH & PHILLIP E. HAMMOND, VARIETIES OF CIVIL RELIGION 41 (1980). Although such ideas have certainly undergone periods of erosion, see, e.g., SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE (1972), that religion has been and remains a powerful force in American culture is undeniable. As Henry May wrote, "[t]o say that something which attracts some concrete allegiance from 60 percent of the population is insignificant, one must be extraordinarily certain about

vides a deeper meaning for life and the opportunity to belong to a defined community. For such individuals, the division of life into religious and secular spheres, with little commerce between them, is a virtual impossibility. Although the vast majority supports the concept of church-state separation, this ideal does not mean the exclusion of the religious from public life.

In this Article, I will examine this model of religious/secular separation. I will first examine the Supreme Court's efforts to separate the religious and the secular as a matter of First Amendment, doctrinal interpretation. The Supreme Court's efforts have proceeded along two lines: *analytical* separation, or the separation of religious motives, uses, meanings, and so on, from secular ones; and a deeper (and related) *spheric* separation, or the separation of religion, as a totality, from public life and government. I will argue that these separationist models, although often unspoken, have in fact been used by the Court to provide fundamental shape and content to First Amendment guarantees.

Distinctions between the religious and the secular can surely be made; indeed, such distinctions are assumed if the First Amendment's Religion Clauses are to have meaning at all. Questions of distinction are different, however, from those of separation. Can the religious and the secular uses of an object be separated, such that the object can be put to a secular use but not to a religious one? Can the religious and the secular motivations of an individual be separated, such that we can be sure that an action has secular reasons, but not religious ones? Sometimes, the answer is yes. We can identify religious and secular institutions; we can identify clearly religious exercises and those which have no apparent religious content.

I shall argue, however, that such analytical separation, and the deeper spheric separation it serves, are more often analytical and practical impossibilities. Religious beliefs, expressions, or values are intrinsically interwoven in the lives of human beings and in the cultures and governments that human beings create. The Court's attempted separation of the religious and the secular, in the terms it has evolved, is in fact an impossible task;

and in the wake of its failure lies a body of jurisprudence of inevitable—and unparalleled—contradiction and confusion.

If we reject this separationist model as the structure for First Amendment jurisprudence, what could take its place? In an effort to answer this question, I will examine the alleged historical roots for the separationist approach. The Supreme Court has, through the invocation of writings by men such as Thomas Jefferson and James Madison, attempted to identify an alleged historical separation between the religious and the secular, which it then employs to guide its understanding of the constitutional guarantees of individual free exercise and freedom from government establishment of religion.¹⁵ The Court argues that through this separation, Madison, Jefferson, and other reformers believed that the secular state would be protected and governmental encroachment on fundamental religious liberties would be contained.

Through an examination of the historical evidence presented, I will argue that a separation of the religious and the secular, in the terms envisioned by the Supreme Court, was not a part of the reformist strains of political or constitutional discourse during the Founding Era. The religious freedom that was the core of concern at the time was freedom of conscience; its preservation represented the highest common factor of agreement among anti-clericalists (such as Jefferson and Madison) and those composing other parts of the religious and political spectra. Free inquiry, or freedom of conscience, was believed to be necessary in order that religious or "transcendent" moral truths could be apprehended by individuals and could, in turn, be implemented by government. Such truths, and the values that they suggested, were believed to be vital for the creation of basic social bonds and for maintenance of the foundations of republican government. Individual free religious exercise and freedom from government establishment of religion were seen as necessary ways to preserve individual free, "religious" inquiry as a vital and necessary part of individual and collective life.

The approach to religious freedom that emerged during this

15. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

period never required separation of the religious and the secular in the terms that the Supreme Court assumes. To the contrary, this ideal assumed the essentiality of freedom of conscience (or religious free exercise) in individual affairs *and* in collective life. The individual and social utility of this freedom required that it be afforded the greatest latitude that maintenance of public order could allow. There was only one exception to this: the prevention of alliance or merger of religious and governmental institutions. Because institutional alliance was believed to carry the potential for destruction of freedom of conscience (the core, underlying value), such alliance was prohibited.

This approach—which I shall call the “historical” approach—is strikingly different from that which we generally assume to be necessary for the preservation of religious freedom. Its broad understanding of the religious, and of the primacy of religious freedom (as essential to private *and* public life), represents a radical departure from most existing twentieth-century assumptions. If we acknowledge the inseparability of religious and secular beliefs, values, and expressions—if all are acknowledged to be integral and important parts of our culture, society, and government—is there any shape or content to First Amendment guarantees? Or do they—as some fundamentalist claims imply—simply dissolve into protections and prohibitions of unlimited scope?

In the third Section, I will consider what the implications of this historical or “nonseparationist” approach might be. I will argue that the historical approach in fact yields a more workable, albeit quite different, shape and content for First Amendment guarantees. Free exercise protections will, for instance, include the recognition of societal as well as individual interests in the protection of claims, fundamentally altering the outcome in many cases. In the Establishment Clause area, general concern with the expungement of religious values, motivations, uses, purposes, and so on in the public sphere will be replaced by the enforcement of religious and governmental institutional separation. I will demonstrate that, in both cases, our judicial system can preserve fundamental religious freedoms, while acknowledging the integrated nature of the religious and the secular in human life and experience. I will also argue that under

this approach, the seeming conflict between Free Exercise and Establishment Clause principles is, in large part, reconciled.

In conclusion, I will consider a deeper issue posed by those who advocate the separation of the religious and the secular in public life. A debate has raged recently over whether the "traditional" exclusion of the religious from liberal democratic politics is either necessary or desirable in view of its inherent discrimination against religious persons and views.¹⁶ I will consider the question in the reverse light: whether we, as custodians of a liberal, democratic government, *should wish* to separate the religious from the secular in public affairs. The articulate spokesmen of the Founding Era did not see religion, society, or government in such narrow terms. The question that we must address is whether we, indeed, wish to do so.

Before discussing these ideas, I will address two questions. The first is what the "religious," as used in this Article, is intended to convey. During the Revolutionary period, more than three thousand religious organizations existed in the American colonies.¹⁷ Differences among these groups were profound; the roles assigned to reason and revelation, the interpretation or authenticity of religious writings, the existence or nature of a Supreme Being, and so on, created charges and countercharges of heresy or worse.¹⁸ Despite these differences, the fact that the

16. Some argue in favor of the exclusion of religion from democratic discourse. See, e.g., DAVID LYONS, *ETHICS AND THE RULE OF LAW* 190-91 (1984); MOONEY, *supra* note 6, at 14-15; RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 8 (1984); Stephen Holmes, *Gag Rules or the Politics of Omission*, in *CONSTITUTIONALISM AND DEMOCRACY* 19 (Jon Elster & Rune Slagstad eds., 1988); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 *YALE L.J.* 1611, 1620-21 (1993); Cass Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1555 (1988); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 *CORNELL L. REV.* 747 (1993). Others resist the exclusion of the religious voice, in whole or in part. See, e.g., CARTER, *supra* note 6; KENT GREENAWALT, *RELIGIOUS CONVICTION AND POLITICAL CHOICE* (1988); MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991); Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 *DUKE L.J.* 977; Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 *VA. L. REV.* 671 (1992).

17. 1 ANTON P. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 273 (1950).

18. One common target for such charges were Deists, who, although they clearly believed in the existence of a Supreme Being and shared other tenets of major religious groups, were often excoriated for their explicit rejection of other Christian

"religious" had meaning to the Founding generation is beyond dispute. When the Virginia Declaration of Rights or the Massachusetts Constitution referred to religious rights and liberties, those references clearly had meaning for the people of that age. Although particular beliefs differed from individual to individual, religious beliefs shared a family resemblance that generated widespread recognition and desires for protection. Throughout our history, Americans have had a shared, cultural understanding of what religious liberty is—the ability of individuals to freely decide about ultimate matters of belief, meaning, and value.¹⁹ In this study, "religion" is used in this sense. It does not have a sectarian, or even deistic, meaning. Rather, this study proceeds from the premise that religion, in the sense of the search for fundamental or transcendent truths, is an integral part of human freedom and human experience; and that it is for this reason that we so persistently seek its protection.

Finally, because of the heightened sensitivity that surrounds these issues, the motivations and purposes that underlie this Article should be made clear. I do not consider myself a "religious" person in the traditional sense. My intention is not to argue for religious evangelism in politics, or to advocate the "return of religion" to public schools. The exclusion of explicitly religious argument from public dialogue, as a way to avoid impediments to conversation, deliberation, and the achievement of consensus, is, in my view, a worthwhile and necessary public goal. The principles of church-state institutional separation that I describe here are, in many respects, more severe than those established by prevailing Supreme Court doctrine.

Rather, my concern is with the role of individual conscience in public life. Throughout our history, individual conscience has provided one of the few indictments against the use of the existence of law or the existence of collective judgment as a justification for the failure of individuals to make moral inquiry. By "separating" the religious from the secular, and excluding the

beliefs. See RUTH H. BLOCH, *VISIONARY REPUBLIC: MILLENNIAL THEMES IN AMERICAN THOUGHT* 196-98 (1985). Some Federalists expressed the fear that if Deism or noninstitutionalist evangelism grew, the moral fabric of the nation would be at risk. See LINDA K. KERBER, *FEDERALISTS IN DISSENT* 212 (1970).

19. See MILLER, *supra* note 9, at 340-43.

former from public life, we implicitly exclude (as irrelevant or illegitimate) ultimate issues of belief, meaning, and value. We justify and reify a model of superficiality and self-centeredness in politics. We risk the loss of individual conscience in public life.

II. THE ATTEMPTED SEPARATION OF THE RELIGIOUS AND THE SECULAR: THE STATE OF SUPREME COURT JURISPRUDENCE

Of all constitutional provisions, the Religion Clauses of the First Amendment present the most overt challenge to the attempted separation of the religious and the secular in governmental affairs. The very existence of the Free Exercise and Establishment Clauses is a testament to the existence of religious belief and its potential involvement with government. The Free Exercise Clause establishes the protection (and limits) of individual action (or inaction) on the basis of religious belief; the Establishment Clause establishes the protection (and limits) of government in its interaction with religion. Both challenge the shape, form, and content of the religious/secular divide.

The approach of the Supreme Court has been to unremittently attempt to separate the religious from the secular in two ways: *analytical* separation, or the separation of religious motives, meanings, and so on, from secular ones; and a deeper (and related) *spheric* separation, or the separation of religion, as a totality, from public life and government. As the first effort has proven to be increasingly problematic, the second has become more insistent. The result has been the development of a body of jurisprudence of perhaps unparalleled contradiction and confusion.

The problems begin with the analytical first step in the application of the Religion Clauses: the definition of religion itself. The Court's definition of religion has undergone a process of evolution. In early cases, the Court defined religion in traditional, theistic terms: it was "one's views of his relations to his Creator"²⁰ or a "belief in a relation to God involving duties superior to those arising from any human relation."²¹ Not until *Torcaso*

20. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

21. *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting).

v. Watkins,²² decided in 1961, did the Court extend recognition to nontheistic religions as well. In its now-famous footnote, the Court stated that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."²³ Later, in the context of statutory interpretation, the Court attempted to refine the definition of a nontheistic religious belief to be one that is "sincere and meaningful" and "occupies in the life of its possessor a place parallel to that filled by . . . God." It is a belief that is "based upon a power or being, or upon a faith, to which all else is . . . ultimately dependent."²⁴

The difficulty in determining the boundaries of religious belief under these definitions²⁵ was compounded by the Court's at least ostensible adherence to the principle that both the nature of asserted religious belief and the question of an individual's adherence to that belief must be left to individual determination, without interference or second-guessing by the courts.²⁶ In

22. 367 U.S. 488 (1961).

23. *Id.* at 495 n.11.

24. *United States v. Seeger*, 380 U.S. 163, 176 (1965).

25. For scholarly attempts to derive a workable definition of religion from these tests, see, for example, John H. Mansfield, *Conscientious Objection—1964 Term*, in *RELIGION AND THE PUBLIC ORDER* 3, 10 (David A. Gianella ed., 1965) (proposing that religious belief is "the affirmation of some truth, reality, or value" that "addresses itself to basic questions to which man has always sought an answer, questions about the meaning of human existence, the origin of being, the meaning of suffering and death, and the existence of a spiritual reality"); Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 *TEX. L. REV.* 139, 164-65 (1982) (suggesting that religion consists of beliefs or practices based on a perception of reality composed of both "sacred" (that which transcends experience in the natural environment) and "profane" (natural) elements); Note, *Toward a Constitutional Definition of Religion*, 91 *HARV. L. REV.* 1056, 1071 (1978) (arguing that religion is an individual's "ultimate concern," which may be political, economic, or cultural): For critiques of these efforts, see Anand Agneshwar, *Rediscovering God in the Constitution*, 67 *N.Y.U. L. REV.* 295 (1992); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 *U. PITT. L. REV.* 673 (1980); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 *GEO. L.J.* 1519 (1983).

26. Indeed, it has been suggested that judicial formulation of a definition of religion may itself violate Establishment Clause guarantees. See *Board of Educ. v. Barnette*, 319 U.S. 624, 658 (1943) (Frankfurter, J., dissenting) ("Certainly this Court cannot be called upon to determine what claims of conscience should be recognized

United States v. Ballard,²⁷ the Court reiterated that the boundaries of religious belief are subjective, understood and defined by the individual alone:

Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. . . . It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. . . . Men may believe what they cannot prove. . . . Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.²⁸

Respect for the liberal principle of individual free inquiry and autonomy in religious matters reached its zenith in *West Virginia State Board of Education v. Barnette*,²⁹ when the Court stated that "[i]f 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"³⁰ As the Court has very recently reiterated, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."³¹

and what should be rejected as satisfying the 'religion' which the Constitution protects. That would indeed resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid.").

27. 322 U.S. 78 (1944). *Ballard* was the first case that squarely presented the issue of potential conflict between theistic definitions of religion and the principle of individual free inquiry and definition. Its advent was undoubtedly the result of the rise of nontheistic and other "unorthodox" religious beliefs in the United States. Cf. James Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS., Spring 1981, at 3 (discussing the rise of a heterodoxy of moral values based upon religious beliefs).

28. *Ballard*, 322 U.S. at 86-87 (citation omitted).

29. 319 U.S. 624 (1943).

30. *Id.* at 642; see also *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("[I]t is no business of [the] courts to say . . . what is a religious practice or activity . . .").

31. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2225 (1993) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981)). In *Hialeah*, the Court noted that the appellants' claims "cannot be deemed bizarre or incredible." *Id.* at 2226 (quoting *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 n.2 (1989)). If a belief need not be "comprehensible to others," one wonders why the Court implies the relevance of a "bizarre or incredible" test.

The extension of "religion" to include nontheistic or unorthodox beliefs, and the leaving of the content and sincerity³² of beliefs to the individual declarant, did not represent a retreat from the attempt to separate the religious and the secular: if anything, it made the need to establish boundaries even more pressing. If the definition of religion is nebulous at best, and what definition exists is left to the individual adherent, the potential reach of claims under the Free Exercise Clause or Establishment Clause becomes unlimited.

Traditionally, the Court has attempted to contain free exercise claims in two ways: by distinguishing (pure) religious belief from ("less religious" or "quasi-secular") religiously-motivated action, and by weighing such action against any compelling state interest involved. Freedom to believe receives absolute protection, whereas freedom to act (in accordance with religious belief) does not.³³ Freedom to act is protected only if it is required by a central religious belief, is substantially burdened by the governmental action, and is not outweighed by a compelling governmental interest.³⁴

The problems with these tests are apparent. The distinction between belief and action assumes an analytical and actual separation may characterize some mainstream religious faiths, but is clearly rejected by others.³⁵ Since, under the Court's view, the nature of religious belief must be left to the religious

32. Inquiry into the sincerity of an individual's religious beliefs might well "run afoul of the spirit of constitutionally protected religious guarantees." *Braunfeld v. Brown*, 366 U.S. 599, 609 (1961); see Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604, 622 (1964) (arguing that assessment of the validity of religious beliefs intrudes into individual religious freedom and risks "establishing a notion respecting religion" in violation of the Establishment Clause).

33. See *Braunfeld*, 366 U.S. at 603-05; *Cantwell v. Connecticut*, 310 U.S. 296, 304-05 (1940).

34. See *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Thomas v. Review Bd.*, 450 U.S. 707, 717-19 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972).

35. See, e.g., *State v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 859-62 (Minn. 1985) (Peterson, J., dissenting) (discussing current Christian views of religious beliefs and secular life), *dismissed for lack of juris.*, 478 U.S. 1015 (1986); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 364 n.81 (1980) (observing that Jehovah's Witnesses and Jews, among others, see a broad role for religious beliefs in areas of life often considered to be secular).

declarant, the simple exemption of belief from governmental control represents a potentially large incursion by religious claims into the realm of secular state authority. Faced with this problem, the Court simply has found virtually all claims to involve "action"³⁶—even when founded on the status of an individual as a leader of a religious group.³⁷ Indeed, in the history of the Court's adjudication of free exercise claims, only once has the Court recognized clear governmental coercion of religious belief: the required declaration of belief in God for the holding of public office.³⁸

The collapse of the belief/action distinction has pushed the analysis of free exercise claims into the second part of the Court's test: whether there is a central religious belief or practice that is burdened by state action and, if so, whether it is outweighed by a compelling governmental interest. Although there has been some discussion of the "centrality" and "burden" requirements, and a rare case where the absence of a "burden" on a "central" religious belief seemed to play a part in the Court's analysis,³⁹ the need to defer to an individual claimant's

36. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 109-10 (1943) (holding that distribution of religious literature was "action," even though "[t]his form of religious activity occupies the same high estate . . . as . . . preaching from the pulpits"); *Cantwell v. Connecticut*, 310 U.S. 296, 303-07 (1940) (holding that delivery of the religious message by Jehovah's Witnesses in house-to-house canvassing was religious "action" subject to compelling state interest test).

37. *McDaniel v. Paty*, 435 U.S. 618, 626-27 (1978) (plurality opinion) (holding that Tennessee law operated against claimant "because of his *status* as a 'minister' or 'priest.'" The law was "directed primarily at status, acts, and conduct," and not "freedom to believe"). But see *id.* at 631 (Brennan, J., concurring in the judgment) ("The characterization of the exclusion as one burdening appellant's 'career or calling' cannot withstand analysis. . . . One's religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.").

38. *Torcaso v. Watkins*, 367 U.S. 488 (1961). In two other cases, the Court held that state action unconstitutionally required the "declaration of belief," but the decisions rested more clearly on speech than on religious grounds. See *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

39. See, e.g., *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 304-05 (1985) (denying free-exercise claim, on the ground that government action did not actually burden religious beliefs); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (Although "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' inter-

declarations of the existence, importance, and impairment of religious beliefs has made this determination an unworkable basis for distinguishing protected from unprotected claims.⁴⁰ Attention has therefore devolved onto the final part of the inquiry: whether there is a compelling governmental interest involved.

An examination of the Court's implementation of this weighing of competing values compels the conclusion that the Court has, in fact, used this test as a surrogate for its deeper notion of the religious/secular divide. If the religious group in question respected the separation and autonomy of the religious and secular spheres along lines generally in accord with liberal notions—if its claim was insular, discrete, and posed no fundamental challenge to the Court's conception of the separation of the religious from the secular sphere of public life—its claim was upheld, even when powerful, countervailing interests were at stake.⁴¹ If, however, the free exercise claim involved a direct

pretations of those creeds, . . . [w]e do, however, have doubts [as to] whether the alleged burden . . . is a substantial one.”).

40. In a recent free exercise decision, all members of the Court appeared to abandon the “centrality” test. See *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990) (“It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field. . . . [C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”); *id.* at 906-07 (O’Connor, J., concurring in the judgment) (“I agree with the Court . . . that because “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith,” . . . our determination of . . . constitutionality . . . cannot, and should not, turn on the centrality of the particular religious practice at issue.”); *id.* at 919 (Blackmun, J., dissenting) (“I agree . . . that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is ‘central’ to the religion”). But cf. *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 474 (1988) (Brennan, J., dissenting) (“I believe it appropriate . . . to require some showing of ‘centrality’ before the Government can be required either to come forward with a compelling justification for its proposed use of federal land or to forego that use altogether.”).

41. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for instance, the Court upheld the right of the Amish to refuse to send their children to public schools, despite the state’s extremely strong interest in public education. Although the Amish rejected the idea of the separation of the religious and the secular within the individual, they accepted it in their dealings with the state; their desire was to be apart from the rest of the world, not in it. See *id.* at 246 (Douglas, J., concurring in part and dissenting in part) (“[T]he emphasis of the Court on the ‘law and order’ record of

challenge to religious/secular separation—either by directly challenging a prevailing secular norm⁴² or by a direct challenge to public, “secular” action⁴³—it was denied, even when the governmental interest involved did not appear to be of a vastly more compelling nature.⁴⁴

The collapse of the compelling interest test into a generalized concern for the protection of the secular state reached its culmination in *Lyng v. Northwest Indian Cemetery Protective Association*⁴⁵ and *Employment Division v. Smith*.⁴⁶ In *Lyng*, Native Americans challenged the construction of a road and the conducting of logging activities in an area of a national forest used for their religious worship.⁴⁷ The Court acknowledged at the outset that “[i]t is undisputed that the Indian respondents’ be-

this Amish group of people is quite irrelevant”); see also *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987) (invalidating state unemployment compensation rules that conditioned the availability of benefits upon an applicant’s willingness to work under conditions forbidden by his or her religion); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (same); *Sherbert v. Verner*, 374 U.S. 398 (1963) (same); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking down licensing and taxing systems that restricted religious speech and solicitations); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (same).

42. See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (denying Mormons’ asserted right to practice polygamy); *Reynolds v. United States*, 98 U.S. 145 (1879) (same). The powerful, symbolic nature of the secular norm, and the “flagrant” manner of the Mormons’ challenge, ensured their persecution and defeat—even though they wished to live apart from others. Polygamy was, the Court wrote, “contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.” *Latter-Day Saints*, 136 U.S. at 49. The Court questioned “whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself.” *Id.*

43. See, e.g., *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting Native Americans’ claim for exemption from assignment of a Social Security number); *United States v. Lee*, 455 U.S. 252 (1982) (rejecting Amish claim for exemption from participation in the Social Security system); *Gillette v. United States*, 401 U.S. 437 (1971) (rejecting claim for exemption by selective service inductee who opposed a particular war on religious grounds).

44. See, e.g., *Bowen*, 476 U.S. at 693 (interest of the government in the “integrity” of the Social Security system); *Lee*, 455 U.S. at 252 (same); *Gillette*, 401 U.S. at 437 (interest of the military selective service in a system free from claims for exemptions).

45. 485 U.S. 439 (1988).

46. 494 U.S. 872 (1990).

47. *Lyng*, 485 U.S. at 441-42.

liefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion"⁴⁸—assertions that were, indeed, unassailable under the Court's prior decisions.

Under the Court's traditional test, this finding next required the demonstration of a compelling governmental interest. The problem, however, was that the government could demonstrate no such compelling interest in the activities at issue.⁴⁹ Faced with this situation, the Court simply held the compelling interest test to be inapplicable to all claims of this type. Only when the individual is *coerced* by government to *act* in violation of his religious beliefs must a compelling governmental interest be shown. If the government's actions simply create conditions that make religious exercise impossible, that (in the absence of government intent to discriminate against the religious) creates no cognizable claim under the Free Exercise Clause.⁵⁰

The reason for the Court's decision is clear. If individuals could declare road building and logging to be burdensome to religious exercise, they could declare other governmental activities to be as well.⁵¹ To "require government to bring forward a compelling justification for its otherwise lawful actions" whenever claimants assert a clash between government and religious beliefs would result in an intolerable intrusion of religious beliefs into public affairs.⁵²

In *Smith*, the respondents were dismissed from their employment "because they ingested peyote for sacramental purposes at a ceremony of the Native American Church."⁵³ They were subsequently denied unemployment compensation benefits because they were discharged for work-related "misconduct."⁵⁴ They sued on the basis that the state could not condition the availability of unemployment compensation on an individual's will-

48. *Id.* at 447.

49. *Id.* at 445.

50. *Id.* at 449, 451-52.

51. *Id.* at 452.

52. *Id.* at 450-51.

53. *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990).

54. *Id.*

ingness to forgo conduct that was religiously required.⁵⁵

The Court rejected this claim.⁵⁶ If prohibiting or burdening the exercise of religion is not the object of the law, but merely "the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."⁵⁷ The Court noted that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds,"⁵⁸ and that:

If the "compelling interest" test is to be applied at all . . . it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says . . . , many laws will not meet the test. Any society adopting such a system would be courting anarchy [W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.⁵⁹

Accommodation of religious belief must be left to the "political process."⁶⁰ This "must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."⁶¹

55. *Id.* at 876.

56. *Id.* at 890.

57. *Id.* at 878; *see also* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993) ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

58. *Smith*, 494 U.S. at 887 (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)) (emphasis removed).

59. *Id.* at 888.

60. *Id.* at 890.

61. *Id.*

With the removal of all "neutral" legislation from the traditional, compelling interest test, the Court can afford to stress the rigor of the test in those few cases in which it still applies. In *Hialeah*, the Court stressed that:

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly

Thus, faced with the prospect of unlimited claims—a product of the Court's prior decisions that leave the definition and scope of the "religious" to the individual adherent—and the intrusion that such claims might make into the public or "secular" sphere, the Court reacted with renewed vehemence of separation. If the First Amendment previously was read to mean that the religious could compel government to an accounting, that reading was now incorrect. For the vast number of governmental acts, the First Amendment simply does not apply.

Holding the First Amendment to be inapplicable is a solution of sorts; it is, at least, a rule that is simple in its application. The state of First Amendment doctrine after *Lyng* and *Smith* has not, however, advanced much in overall coherence. The protection of freedom to believe will receive absolute protection, while the manifestation of that belief will not—a separation which, at least on an analytical level, is an almost hopeless impossibility. If prohibiting or burdening religion is the object of the law, it must be justified by a compelling governmental interest; if it is not so justified, it is unconstitutional.⁶² How the "object" of any law and its "anti-religious" nature are to be determined is left unresolved.⁶³ The constitutionality of a "neutral" law, in turn, will depend on whether it requires an individual to

tailored in pursuit of those interests. . . . The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] . . . down" but "really means what it says."

Hialeah, 113 S. Ct. at 2233 (quoting *Smith*, 494 U.S. at 888) (citations omitted).

62. See *Hialeah*, 113 S. Ct. at 2233.

63. Recently, the Court gave its first extended statement on the question of how a law's anti-religious bias, in the Free Exercise context, might be shown. Anti-religious bias, or the failure of neutrality, is closely related to the law's general applicability; a law which fails one test is likely to fail the other. *Id.* at 2226. The issue is whether "the object or purpose of a law is the suppression of religion or religious conduct." *Id.* at 2227. Relevant evidence includes the text of the law (such as reference to a religious practice without a discernable secular meaning) and its real effect and operation (in a way which targets religious practices). *Id.* at 2227-30.

Several Justices, including Justice Kennedy (who otherwise authored the majority opinion), wished to explicitly adopt the approach used in Establishment Clause cases, where relevant evidence includes "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, as well as the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 2230-31. The majority did not agree.

act in violation of his religious beliefs, prohibits action in violation of religious beliefs, or simply creates conditions that make religious exercise impossible.⁶⁴ This is true even though action and inaction are the mirror images of each other, and suppression of all religious exercise surely works to kill belief itself.⁶⁵

The Court's reliance upon separationist principles in the construction of its Establishment Clause jurisprudence has fared no better. Under *Lemon v. Kurtzman*,⁶⁶ a three-pronged test is applied to determine whether a governmental practice violates the Establishment Clause: whether it has a secular purpose; whether its primary effect is one that neither advances nor inhibits religion; and whether it fosters excessive government entanglement with religion.⁶⁷ The "secular purpose" and "primary effect" prongs of this test have been recently reformulated by the Court to ask whether the challenged government practice "endorses" religion—whether it "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is *avored* or *preferred*."⁶⁸

The reasons that the Court has expressed for these tests reflect the fears that underlie the enforcement of religious/secular spheric separation. The "union of government and religion tends to destroy government and to degrade religion."⁶⁹ Laws that permit government involvement in religious practices are inherently "coercive." "When the power, prestige and financial support

64. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-53 (1988).

65. See *id.*, at 468 (Brennan, J., dissenting) ("[R]eligious freedom is threatened no less by governmental action that makes the practice of one's chosen faith impossible than by governmental programs that pressure one to engage in conduct inconsistent with religious beliefs.").

66. 403 U.S. 602 (1971).

67. *Id.* at 612-13. The *Lemon* test has been routinely applied in Establishment Clause cases since its promulgation. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) (refusing to reconsider *Lemon*); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 n.44 (1989) (citing cases that have applied the *Lemon* test). But cf. *Marsh v. Chambers*, 463 U.S. 783 (1983) (declining to apply the *Lemon* test).

68. *County of Allegheny*, 492 U.S. at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)); see also *Board of Educ. v. Mergens*, 496 U.S. 226, 249-50 (1990) (plurality opinion); *id.* at 264 (Marshall, J., concurring in the judgment); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (O'Connor, J., concurring).

69. *Engel*, 370 U.S. at 431.

of government is [sic] placed behind a particular religious belief, [there is] . . . indirect coercive pressure upon religious minorities to conform"⁷⁰ Government religious establishment and religious persecution "go hand in hand."⁷¹ The involvement of religion leads to "divisiveness"⁷²—presumably the conflict between competing, religiously-based values.⁷³

The application of these Establishment Clause tests has resulted in attempts to separate analytically the religious and the secular in a myriad of ways. Cases have turned on (1) the separation of religious and secular *motivations* of legislators and public officials (secular "purpose"),⁷⁴ (2) the separation of reli-

70. *Id.*; see also *Lee*, 112 S. Ct. at 2655 ("[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise").

71. *Engel*, 370 U.S. at 432.

72. See *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) ("[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect."); see also *Edwards*, 482 U.S. at 584; *Lynch v. Donnelly*, 465 U.S. 668, 702-03 (1984) (Brennan, J., dissenting); *Marsh v. Chambers*, 463 U.S. 783, 799-800 (1983) (Brennan, J., dissenting); *Wolman v. Walter*, 433 U.S. 229, 258 (1977) (Marshall, J., concurring in part and dissenting in part); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 749 (1976) (plurality opinion); *Meek v. Pittenger*, 421 U.S. 349, 372 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 794-98 (1973).

73. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 651 (1989) (Stevens, J., concurring in part and dissenting in part) ("[Religious] displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow public bodies to foment such disagreement."); cf. *Lee*, 112 S. Ct. at 2655-56 (noting that "[d]ivisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases." Divisive potential is particularly acute, however, where "coercive pressures exist," such as an overt religious exercise in a secondary public school environment.).

74. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (finding no secular motivation for state statute prescribing a period of silence "for meditation or voluntary prayer" in public schools); *Edwards*, 482 U.S. at 591-93 (holding that motivation for statute requiring the teaching of "creation-science" with "evolution-science" was "clearly to advance the religious viewpoint"); *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968) (finding that "religious advertisements and campaign" for passage of statute prohibiting the teaching of evolution in public schools established legislators' religious motivations); cf. *Board of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (Even if some legislators were motivated by a desire to protect religious speech, that alone would not invalidate the Act; "what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators

gious and secular *uses* of books, instructional aids, or equipment (secular "effect"),⁷⁵ (3) the separation of religious and secular *functions* of particular tasks of government or religious institutions ("entanglement"),⁷⁶ (4) the separation of religious and secular elements of *symbols* (secular "purpose," "effect" or religious "endorsement"),⁷⁷ and so on.

The problems generated by this approach have been both analytical and empirical.⁷⁸ In determining whether a statute

Because the Act on its face grants equal access to both secular and religious speech, . . . the Act's purpose was not to "endorse or disapprove of religion." (quoting *Wallace*, 472 U.S. at 56) (emphasis in original).

75. See, e.g., *Wolman*, 433 U.S. at 250 (finding unconstitutional the provision of projectors, tape recorders, and record players to nonpublic schools, because secular and religious educational uses were impossible to separate); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (holding that loan of secular textbooks to parochial school students had a secular, not religious, effect); *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (prohibiting Bible reading as a religious activity in public schools; "objective" study of the Bible as part of a secular program of education would be permissible).

76. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (holding state provision of sign-language interpreter to accompany Catholic high school student permissible as a non-entangling, "neutral" service); *Meek v. Pittenger*, 421 U.S. 349, 371-72 (1975) (holding provision of auxiliary services by public school teachers in nonpublic schools too entangling in view of required surveillance to ensure that teachers did not advance religious goals); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472, 480 (1973) (holding that state reimbursement of costs of testing and record keeping in private schools was unconstitutional, in the absence of effort to determine if the testing was free of religious content or function); *Lemon*, 403 U.S. at 619 (holding that state plans to pay nonpublic school teachers for teaching secular subjects was too entangling, in view of the surveillance of teachers' neutrality required).

77. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 681-82 (1984) (holding that inclusion of a creche in a town Christmas display was not, under the circumstances, the use of a religious symbol that endorsed religion); *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding that "nonsectarian" legislative prayer had historical and civic, not religious, meaning); *Stone v. Graham*, 449 U.S. 39 (1980) (holding that display of Ten Commandments on the walls of a public classroom was the use of a "religious" symbol, in violation of the Establishment Clause).

78. The apparently inconsistent results from the application of these tests are well known. Nondenominational prayer in public schools was unconstitutional, *Engel v. Vitale*, 370 U.S. 421, 424-36 (1962), while prayer in legislatures was not. *Marsh v. Chambers*, 463 U.S. 783, 786-95 (1983). State tax revenues to pay the basic bus fares of parochial school pupils as part of a general transportation program was permissible, *Everson v. Board of Educ.*, 330 U.S. 1, 8-18 (1947), but transportation for parochial school field trips was not. *Wolman*, 433 U.S. at 252-55. Textbook loans to parochial school children were permissible, *Allen*, 392 U.S. at 241-48, but loans of

had a religious purpose, thus rendering it unconstitutional, the Court has cited the testimony of state senators at trial,⁷⁹ the addition of three words to statutory text,⁸⁰ the existence of antecedent, "religious" laws,⁸¹ and the existence of religious advertisements and campaigns by religious groups in support of the government act.⁸² Although members of the Court have argued that a statute may be motivated by both secular and religious considerations,⁸³ or that what motivated one legislator may not have motivated another,⁸⁴ such considerations have rarely been acknowledged in its analysis.

The problems involved in divining unconstitutional religious motivation became particularly acute in *Edwards v. Aguillard*,⁸⁵ where the Louisiana legislature expressly articulated a secular purpose for the "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act.⁸⁶ This statute prohibited the teaching of the theory of evolution in public schools unless accompanied by instruction in

instructional equipment or materials to parochial schools were not. *Meek*, 421 U.S. at 362-66. Diagnostic services were properly provided by public employees to students in parochial schools, *Wolman*, 433 U.S. at 241-44, but guidance counseling and testing, remedial instruction, and speech and hearing therapy were not. *Meek*, 421 U.S. at 367-73.

79. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 56-60 (1985).

80. *Id.* at 59 ("meditation or voluntary prayer") (emphasis added).

81. *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968).

82. *Id.* at 108 n.16.

83. See, e.g., *Wallace*, 472 U.S. at 56 ("[E]ven though a statute that is motivated in part by a religious purpose may satisfy the first [*Lemon*] criterion, . . . the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.") (citation omitted).

84. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting); *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment). Justice O'Connor noted that:

[I]t is particularly troublesome to denigrate an expressed secular purpose due to postenactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute. . . . [C]ourts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing [religion]

Id.

85. 482 U.S. 578 (1987).

86. LA. REV. STAT. ANN. §§ 17:286.1-7 (West 1982).

"creation science."⁸⁷ Although the Act's stated purpose was to protect academic freedom,⁸⁸ a legitimate secular interest, the Court rejected this statement of purpose as a "sham."⁸⁹ To support this finding, the Court cited its conclusions that the Act did not, in fact, further academic freedom,⁹⁰ that the motivation of the legislator who sponsored the bill "was to narrow the science curriculum,"⁹¹ and that there were "historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution"⁹² "The preeminent purpose of the Louisiana Legislature was clearly to ad-

87. *Id.* §§ 17:286.4-.5. "Creation-science" is defined as "the scientific evidences for creation and inferences from those scientific evidences." *Id.* § 17:286.3(2).

88. *Id.* § 17:286.2.

89. *Edwards*, 482 U.S. at 586-87.

90. The Court stated:

If the Louisiana Legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. . . . Thus we agree with the Court of Appeals' conclusion that the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting "evolution by counterbalancing its teaching at every turn"

Id. at 588-89 (quoting *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (1985)) (footnote omitted). The Court also rejected the argument that "academic freedom" might mean "teaching all of the evidence," and that the Act furthered this purpose: "[t]he goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science." *Id.* at 586.

91. *Id.* at 587. The Court stated:

The sponsor of the Creationism Act, Senator Keith, explained during the legislative hearings that his disdain for the theory of evolution resulted from the support that evolution supplied to views contrary to his own religious beliefs. According to Senator Keith, the theory of evolution was consonant with the "cardinal principle[s] of religious humanism, secular humanism, theological liberalism, atheism [sic]." . . . The state senator repeatedly stated that scientific evidence supporting his religious views should be included in the public school curriculum to redress the fact that the theory of evolution incidentally coincided with what he characterized as religious beliefs antithetical to his own. The legislation therefore sought to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution.

Id. at 592-93 (citations and footnote omitted).

92. *Id.* at 591.

vance the religious viewpoint”⁹³

In its analysis, the Court vacillated between an objective and subjective test. At one point, it stated that “[t]he Establishment Clause . . . ‘forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma.’”⁹⁴ Under its characterization of creation science, the Court’s statement would seem to prohibit the teaching of this theory under any circumstances.⁹⁵ Later, however, the Court stated that “teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.”⁹⁶ It was because the primary purpose of the Creationism Act was “to endorse a particular religious doctrine” that it violated the Establishment Clause.⁹⁷ This seems to indicate that a “secular” motivation for the study of creationism—like the “secular” study of the Bible⁹⁸—might meet the requirements of the Establishment Clause.

Different evidence establishing religious motivation was cited by Justice Powell in a concurring opinion. Because the “theory of creation” involved the concept of God (and was identical to a literal interpretation of Genesis),⁹⁹ and because the recognized creation scientists in the United States were affiliated with religious institutions,¹⁰⁰ one could conclude that the “intent of the Louisiana Legislature was to promote a particular religious

93. *Id.*

94. *Id.* at 593 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968)).

95. This could also be argued to invalidate any attempt to *prohibit* the teaching of creation science (or to prefer the teaching of evolution), if the prohibition is motivated by the belief that creation science is antagonistic to another dogma (i.e., the theory of evolution).

96. *Edwards*, 482 U.S. at 594.

97. *Id.* In dissent, Justice Scalia attempted to clarify this muddle by stating that “regardless of what ‘legislative purpose’ may mean in other contexts, for the purpose of the *Lemon* test it means the ‘actual’ motives of those responsible for the challenged action. The Court recognizes this [in this case] . . . as it has in the past” *Id.* at 613 (Scalia, J., dissenting).

98. See *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (“Nothing we have said here indicates that . . . study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”).

99. See *Edwards*, 482 U.S. at 603 n.4 (Powell, J., concurring).

100. *Id.* at 602.

belief.”¹⁰¹ The test that he advanced is subjective, not objective: “[a] decision respecting the subject matter to be taught in public schools does not violate the Establishment Clause simply because the material to be taught ‘happens to coincide or harmonize with the tenets of some or all religions.’”¹⁰² Rather, the Establishment Clause is violated “only when the purpose for [the] decision[] is clearly religious.”¹⁰³

The implications of the Court’s analysis in this case are difficult indeed. The constitutionality of a legislative act hinges, finally, on the subjective purpose that motivated its enactment. If the motivation was religious in nature—as determined by the religious motivations of individual legislators, the law’s coincidence with religious tenets, a history of religious fervor over the issues involved, and so on—the law is invalid, even if it has no explicit religious purpose and no substantial religious effect.¹⁰⁴ Indeed, because the Establishment Clause equally prohibits the promotion or inhibition of religion,¹⁰⁵ completely secular legislation that was subjectively motivated by anti-religious sentiment presumably would be invalid as well.¹⁰⁶ One wonders where this analysis would leave much of the legislation of the twentieth century.¹⁰⁷ The Court’s (at least past) adherence to

101. *Id.* at 603.

102. *Id.* at 605 (quoting *Harris v. McRae*, 448 U.S. 297, 319 (1980)).

103. *Id.*

104. “If the law was enacted for the purpose of endorsing religion, ‘no consideration of the second or third criteri[on] [of *Lemon*] is necessary.’” *Id.* at 585 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)).

105. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 788 (1973).

106. Indeed, the Court has held that anti-religious bias in a law’s enactment may indicate that it violates the Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2227 (1993) (stating that a law is invalid if its “object or purpose . . . is the suppression of religion or religious conduct”).

107. As Justice Scalia observed:

[P]olitical activism by the religiously motivated is part of our heritage. Notwithstanding the majority’s implication to the contrary, . . . we do not presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular faiths. . . . To do so would deprive religious men and women of their right to participate in the political process. Today’s religious activism may give us the Balanced Treatment Act, but yesterday’s result-

the principle that legislation is invalid only when "there [is] no question [but] that the statute or activity was motivated *wholly* by religious considerations"¹⁰⁸ might provide some relief; however, one wonders how the Court could be any more certain of the lack of any secular motivation on the part of any legislative actor in the passage of the Louisiana Act, than it could be in the passage of any other legislation. The purity of separation of religious and secular motivations within individuals is simply an actual and analytical impossibility.¹⁰⁹

The attempted separation of religious uses, functions, and

ed in the abolition of slavery, and tomorrow's may bring relief for famine victims.

.....
We have implied that voluntary governmental accommodation of religion is not only permissible, but desirable. . . . Thus, few would contend that Title VII of the Civil Rights Act of 1964, which both forbids religious discrimination by private-sector employers . . . and requires them reasonably to accommodate the religious practices of their employees, . . . violates the Establishment Clause, even though its "purpose" is, of course, to advance religion While we have warned that at some point, accommodation may devolve into "an unlawful fostering of religion," . . . we have not suggested precisely (or even roughly) where that point might be.

Edwards, 482 U.S. at 615, 618 (Scalia, J., dissenting); cf. *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (rejecting Establishment Clause challenge to restrictions on abortion funding); *McGowan v. Maryland*, 366 U.S. 420, 429-53 (1961) (rejecting Establishment Clause challenge to Sunday closing laws).

108. *Lynch*, 465 U.S. at 680 (emphasis added); see also *Edwards*, 482 U.S. at 614 (Scalia, J., dissenting).

109. As Justice Scalia observed, a particular legislator might be motivated by a desire to "improve education," to "provide jobs for his district," to "make amends with a faction of his party," to "repay[] a favor he owed the majority leader," to appease "a flood of constituent mail," or all of these. *Edwards*, 482 U.S. at 637 (Scalia, J., dissenting). In addition,

where ought we to look for the individual legislator's purpose? We cannot . . . assume that every member present . . . agreed with the motivation expressed in a particular legislator's pre-enactment floor or committee statement. . . . Can we assume . . . that they all agreed with the motivation expressed in the staff-prepared committee reports . . . ? Should we consider postenactment floor statements? . . . Should we consider media reports on the realities of legislative bargaining? All of these sources . . . are eminently manipulable.

Id. at 637-38. Moreover, "[h]aving achieved . . . an assessment of what individual legislators intended, . . . how many of them must have the invalidating intent[?]" *Id.* at 638.

symbols from secular ones has also led to problematic results. The Court's attempts to separate religious from secular uses or functions of textbooks and instructional materials in sectarian elementary and secondary schools resulted in the analytically tenuous conclusions that movie projectors, tape recorders, and record players could be diverted to religious use¹¹⁰ but "secular" books could not,¹¹¹ and that sectarian schools were the prohibited "direct" recipients of field trip transportation but the permissible "indirect" recipients of "attenuated" financial benefits from the provision of sign-language interpreters, basic bus transportation, and student textbooks.¹¹² Efforts to separate the "secular educational function from the sectarian"¹¹³ resulted in conclusions that governmental provision of "diagnostic services" or sign-language interpreters was permissible, because they had "no educational content"¹¹⁴ and were "not closely associated with the educational mission of the . . . school,"¹¹⁵ while the provision of "auxiliary services" (such as counseling, testing, and speech and hearing therapy) was not.¹¹⁶ If religious and secular functions or uses could not be separated—or if such separation could not be guaranteed without state "surveillance"—then there was excessive entanglement in violation of the Establishment Clause.¹¹⁷

Efforts to separate religious from secular have been just as pronounced in a series of cases dealing with public funding of sectarian colleges and universities—this time, in the service of upholding the statutes in question. In *Tilton v. Richardson*¹¹⁸ and *Roemer v. Board of Public Works*,¹¹⁹ the Court upheld

110. See *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977).

111. See *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968).

112. See *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2467-69 (1993); *Wolman*, 433 U.S. at 252-55; *Meek*, 421 U.S. at 359-62; *Everson v. Board of Educ.*, 330 U.S. 1, 8-18 (1947).

113. *Wolman*, 433 U.S. at 250.

114. *Id.* at 244.

115. *Id.*

116. See *Wolman*, 433 U.S. at 241-44; *Meek*, 421 U.S. at 367-73.

117. See *Meek*, 421 U.S. at 372; *Lemon v. Kurtzman*, 403 U.S. 602, 616-20 (1971); cf. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 764 (1976) (finding no entanglement because audits would be "quick" and "nonjudgmental").

118. 403 U.S. 672 (1971).

119. 426 U.S. 736 (1976).

state subsidies and federal construction grants, respectively, to religiously-affiliated colleges and universities on the ground that their "predominant higher education mission [was] to provide their students with a secular education,"¹²⁰ and "the encouragement of spiritual development [was] only 'one secondary objective' of each college"¹²¹ The buildings at issue in *Tilton* were libraries, a language laboratory, and science and fine arts buildings,¹²² there was "no evidence," the Court wrote, "that religion seep[ed] into the use of any of these facilities."¹²³

Even if "religion-free" college instruction and fine arts performances in a sectarian institution can be envisioned, the consistency of the federal Adolescent Family Life Act (AFLA) with the Court's separationist model defies explanation. In *Bowen v. Kendrick*,¹²⁴ the Court upheld the AFLA, which provided grants to sectarian organizations (among others) for the provision of counseling services to adolescents in matters of sexual relations and pregnancy.¹²⁵ There was, the majority wrote, "nothing on the face of the AFLA [which] indicate[d] that a significant proportion of the federal funds [would] be disbursed to 'pervasively sectarian' institutions."¹²⁶ Apparently, in the majority's mind, "sectarian" institutions were "capable of carrying out their functions under the AFLA in a lawful, secular manner,"¹²⁷ while "pervasively sectarian" institutions¹²⁸ were not. The "facially neutral projects authorized by the AFLA"¹²⁹ were not "specifically religious activities,"¹³⁰ and "[were] not converted into such activities by the fact that they [were] carried out by organizations with religious affiliations."¹³¹

The idea that family planning or pregnancy counseling servic-

120. *Tilton*, 403 U.S. at 687.

121. *Roemer*, 426 U.S. at 755.

122. *Tilton*, 403 U.S. at 681.

123. *Id.*

124. 487 U.S. 589 (1988).

125. *Id.* at 593.

126. *Id.* at 610.

127. *Id.* at 612.

128. *Id.*

129. *Id.* at 613.

130. *Id.*

131. *Id.*

es, provided by members of religious orders, can—even in theory—be “purely secular” in nature is truly a difficult one. Indeed, Justice Blackmun, dissenting in *Bowen*, wrote that “asking religious organizations to teach and counsel youngsters on matters of deep religious significance, yet expect[ing] them to refrain from making reference to religion, is both foolhardy and unconstitutional.”¹³² However, rather than questioning a doctrinal model which requires such separation, Justice Blackmun argued that the separationist model (although unrealistic when applied to the AFLA) can be validly applied to other activities:

There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.¹³³

In the one case, “religion is at the core of the subsidized activity, and it affects the manner in which the ‘service’ is dispensed.”¹³⁴ In the other case, “religion plays little or no role; it merely explains why the individual or organization has chosen to get involved in the publicly funded program.”¹³⁵

Separation of the religious from the secular has proven to be equally difficult in cases involving governmental use of religious symbols. In *County of Allegheny v. ACLU*,¹³⁶ the facts were simple. During the Christmas season, a creche was placed on the grand staircase of the Allegheny County courthouse, and a menorah, Christmas tree, and sign entitled “Salute to Liberty” were placed outside of the City-County Building.¹³⁷ Although the facts were simple, the opinion of the Court was not. Its opin-

132. *Id.* at 636 (Brennan, J., dissenting).

133. *Id.* at 641.

134. *Id.*

135. *Id.*

136. 492 U.S. 573 (1989).

137. *Id.* at 582 (opinion of Blackmun, J.).

ion is a testament to the extraordinary difficulties involved in its religious/secular separationist approach.

The Court did not decide this case against a clean slate; it had already decided, in arguably similar cases, that the display of a copy of the Ten Commandments on the walls of a public school classroom violated the Establishment Clause¹³⁸ and that the inclusion of a creche in a municipal display in Pawtucket, Rhode Island, did not.¹³⁹

Against this background, the Court concluded that the creche display was unconstitutional but the menorah display was not.¹⁴⁰ The creche display was the use of a religious symbol by government because it communicated an "indisputably religious" message.¹⁴¹ The creche itself, and the words "Glory to God in the Highest!" that accompanied it, rendered the display religious—"indeed sectarian."¹⁴² The creche in the Pawtucket display was distinguished on the ground that it was surrounded by other, nonreligious objects.¹⁴³ Here, the Court stated, there was "nothing in the context of the display [that] detract[ed] from the creche's religious message. . . . [T]he creche [stood] alone"¹⁴⁴

The Court's attempts to distinguish legislative prayer, the national motto ("In God We Trust"), and religious references in the Pledge of Allegiance ("one nation under God")¹⁴⁵ from the creche display are tenuous at best. The former do not "communicate an endorsement of religious belief"¹⁴⁶ because they are historical, "nonsectarian references to religion by . . . government;"¹⁴⁷ "history cannot legitimate practices [such as the

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

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

140. *County of Allegheny*, 492 U.S. at 602 (opinion of the Court); *id.* at 620-21 (opinion of Blackmun, J.).

141. *Id.* at 598 (opinion of the Court).

142. *Id.*

143. *Id.* at 596-97 (opinion of Blackmun, J.).

144. *Id.* at 598.

145. Other national governmental religious practices include the employment of a congressional chaplain, a special prayer room in the Capitol for use by members of Congress, and the congressional directive that the President set aside an annual National Day of Prayer. *See id.* at 672 (Kennedy, J., concurring in the judgment in part and dissenting in part).

146. *Id.* at 602-03.

147. *Id.* at 603.

creche display] that demonstrate the government's allegiance to a particular sect or creed."¹⁴⁸ However, the Court's reduction of First Amendment protection to "nonsectarian" choices among theistic beliefs contradicted its own decisions as to the scope and nature of the Religion Clauses.¹⁴⁹

Indeed, the internal incoherence of the sectarian/nonsectarian distinction was acknowledged by the Court in *Lee v. Weisman*,¹⁵⁰ decided in 1992. In that case, the issue was the permissibility of a "nonsectarian" prayer (which reflected general Judeo-Christian precepts) at a public high school graduation ceremony.¹⁵¹ Its proponents argued that its "nonsectarian" nature saved it from invalidity under the Establishment Clause.¹⁵² The Court acknowledged that "[t]here may be some support, as an empirical observation," for the idea "that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not."¹⁵³ However, "the idea of a civic religion" must be measured "against the central meaning of the Religion Clauses . . . , which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."¹⁵⁴

148. *Id.*

149. The Court noted:

Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion . . .), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."

Id. at 605 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)); see also *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947); *Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985).

150. 112 S. Ct. 2649 (1992).

151. *Id.* at 2652.

152. *Id.* at 2656.

153. *Id.*

154. *Id.* at 2657. In his concurring opinion, Justice Souter addressed the issue directly, stating that governmental "preference for Theistic over non-Theistic religion" squarely violates the principle of governmental neutrality "between religion and religion, and between religion and nonreligion" under the Establishment Clause. *Id.* at 2671, 2668 (Souter, J., concurring) (quoting *Epperson v. Arkansas*, 393 U.S. 97,

Even more troubling in these cases is the Court's central, operating premise: that a clearly religious object with a clearly religious message can be transformed into one with a secular message when placed in a "secular" context.¹⁵⁵ Justice Stevens' example of this change in *County of Allegheny* only deepens the question.¹⁵⁶ Public use of a religious object or symbol is prohibited, he wrote, "only when its message, evaluated in the context in which it is presented, is nonsecular."¹⁵⁷ "[A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law."¹⁵⁸ The addition of carvings depicting Confucius or Mohammed does not help, since it "may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does 'the permanent erection of a large Latin cross on the roof of city hall.'"¹⁵⁹ Addition of secular figures "such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers."¹⁶⁰ How it is not equally probable that this display signals respect for some great religious leaders and some great secular leaders is not explained.¹⁶¹

The problems involved in attempting to separate religious and secular messages and contexts of clearly religious objects and symbols are illustrated further by Justice Blackmun's treatment of the menorah display. He wrote that the menorah display was permissible because "[t]he necessary result of placing a menorah next to a Christmas tree is to create an 'overall holiday setting'

104 (1968)).

155. See *supra* notes 140-44 and accompanying text.

156. *County of Allegheny v. ACLU*, 492 U.S. 573, 651-52 (1989) (Stevens, J., concurring in part and dissenting in part).

157. *Id.*

158. *Id.*

159. *Id.* (quoting *id.* at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

160. *Id.* at 652-53 (Stevens, J., concurring in part and dissenting in part).

161. As Justice Stevens noted, "[a]ll these leaders . . . appear in friezes on the walls of our courtroom." *Id.* at 653 n.13 (Stevens, J., concurring in part and dissenting in part).

that represents both Christmas and Chanukah—two holidays, not one.”¹⁶² The question therefore became “whether the combined display . . . ha[d] the effect of endorsing both Christian and Jewish faiths, or rather simply recognize[d] that both Christmas and Chanukah are part of the same winter-holiday season”¹⁶³ He wrote that “the latter seems far more plausible”¹⁶⁴ Under the circumstances, “it is not ‘sufficiently likely’ that residents of Pittsburgh . . . perceive[d] the combined display of the tree, the sign, and the menorah as an ‘endorsement’ or ‘disapproval . . . of their individual religious choices.’”¹⁶⁵

Why “[a] reasonable observer would . . . appreciate that the combined display [was] an effort to acknowledge . . . cultural diversity . . . and to convey tolerance of different choices in matters of religious belief or nonbelief”¹⁶⁶ rather than a “double endorsement,”¹⁶⁷ endorsing “two religions to the exclusion of all others,”¹⁶⁸ is not explained. As Justices Brennan and Kennedy note, the creche, menorah, and Christmas tree are all religious symbols of religious holidays; the question is not how to separate their religious and secular aspects, but whether the Establishment Clause forbids their governmental use.¹⁶⁹

The final challenge to the Court’s separationist model is posed by fundamentalist Christian groups who challenge government establishment of secular values on the ground that they are not “secular” at all: rather, they are the establishment of the “religion of Secular Humanism.”¹⁷⁰ In view of the Court’s prior de-

162. *Id.* at 614 (opinion of Blackmun, J.) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring)).

163. *Id.* at 616 (opinion of Blackmun, J.).

164. *Id.*

165. *Id.* at 620 (opinion of Blackmun, J.) (quoting *School Dist. v. Ball*, 473 U.S. 373, 390 (1985)).

166. *Id.* at 635-36 (O’Connor, J., concurring in part and concurring in the judgment).

167. *Id.* at 616 n.64 (opinion of Blackmun, J.).

168. *Id.* at 655 (Stevens, J., concurring in part and dissenting in part).

169. *Id.* at 638-44 (Brennan, J., concurring in part and dissenting in part); *id.* at 665-67 (Kennedy, J., concurring in the judgment in part and dissenting in part).

170. *See, e.g., Crowley v. Smithsonian Inst.*, 636 F.2d 738 (D.C. Cir. 1980) (complainants, believers in “scientific creationism,” challenged two exhibitions containing references to evolution at the Smithsonian Museum of Natural History on the

cisions extending "religion" to include nontheistic belief systems,¹⁷¹ as defined by the individual adherent,¹⁷² these cases are the ultimate, logical extension of its own decisions.

The fundamental problem in the Court's approach has been recognized by the Court itself: that the religious and the secular, as a theoretical and practical matter, are hopelessly intertwined.¹⁷³ An analytical approach that is premised on the separation of the religious from the secular contradicts the fact that "[t]he history of man is inseparable from the history of religion"¹⁷⁴ and that religious practices, references, and beliefs are "deeply embedded in the history and tradition of this country."¹⁷⁵

No matter how unworkable this separation may seem, we are told that it has a deep, historic root. It is mandated by our history. The relationship between the religious and the secular—between religion and government—must be "a wall of separation" for the protection of both. It is to an examination of the truth of these assertions that we now turn.

ground that they supported the religion of secular humanism in violation of the First Amendment's Establishment and Free Exercise Clauses); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (complainants contended that a prescribed set of reading textbooks in the public schools contained acceptance of evolution, secular humanism, futuristic supernaturalism, and pacifism in violation of the Free Exercise Clause), *cert. denied*, 484 U.S. 1066 (1988); *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939, 975 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987) (complainants argued that "a man-centered belief-system, . . . [known] by the appellation 'secular humanism,' [was] promoted in the public schools to the detriment of [the complainant's] children's first amendment right of free exercise, all in violation of the [E]stablishment [C]lause").

171. See *supra* notes 22-24 and accompanying text.

172. See *supra* notes 26-31 and accompanying text.

173. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 673-74 (1984) ("No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government"; indeed, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life . . .").

174. *Engel v. Vitale*, 370 U.S. 421, 434 (1962).

175. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

III. THE HISTORICAL RECORD: RELIGION IN SOCIETY AND GOVERNMENT

A. Introduction

The United States Supreme Court, through the invocation of writings by Thomas Jefferson and James Madison, has attempted to identify and enforce an alleged historical separation between the religious and the secular in public affairs.¹⁷⁶ The Court's operating assumptions appear to be that Madison and Jefferson assumed the separability of the religious and the secular, in individual and collective life, and believed that this separation was essential to protect fundamental religious liberties.¹⁷⁷

176. The piece of historical evidence most frequently cited by the Court for this approach is Jefferson's letter to the Danbury Baptist Association, in which he stated:

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

Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a Committee of the Danbury, Connecticut, Baptist Association (Jan. 1, 1802), in 16 THE WRITINGS OF THOMAS JEFFERSON, CONTAINING HIS AUTOBIOGRAPHY, NOTES ON VIRGINIA, PARLIAMENTARY MANUAL, OFFICIAL PAPERS, MESSAGES AND ADDRESS, AND OTHER WRITINGS, OFFICIAL AND PRIVATE, NOW COLLECTED AND PUBLISHED IN THEIR ENTIRETY FOR THE FIRST TIME 281, 281-82 (Albert E. Bergh ed., 1907) [hereinafter THE WRITINGS OF THOMAS JEFFERSON].

The "wall of separation" allegedly derived from Jefferson's letter first appeared in *Reynolds v. United States*, 98 U.S. 145, 164 (1879). As recently noted by Justice Blackmun, "[t]he Court in *Reynolds* accepted Thomas Jefferson's letter to the Danbury Baptist Association 'almost as an authoritative declaration of the scope and effect' of the First Amendment." *Lee v. Weisman*, 112 S. Ct. 2649, 2662 n.1 (Blackmun, J., concurring) (quoting *Reynolds*, 98 U.S. at 164); see also *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds*, 98 U.S. at 164).

177. See, e.g., *Lee*, 112 S. Ct. at 2662 (citing *Everson*, 330 U.S. at 16); *Everson*, 330 U.S. at 13-16.

This Section will examine the views of reformist spokesmen of the Founding Era on issues involving the relationship between religion and government. This review will include the views of Jefferson and Madison, both of whom figured prominently in church-state debates on national and state levels. It will also include the views of John Adams, Fisher Ames, Alexander Hamilton, John Jay, Rufus King, Thomas Paine, James Wilson, John Leland, Isaac Backus, Jonathan Mayhew, and other political and religious leaders. All had, at various times, important, recorded roles in developing political events. Some were delegates to the Federal Constitutional Convention; some were delegates to the state ratifying conventions; others simply spoke out on these issues. All considered church-state questions and left a record (although partial, in some cases) of their views.

The reformist spokesmen of this era were of diverse religious faiths and backgrounds. Madison, who had Anglican roots, was educated at Princeton (a New Side Presbyterian stronghold) and was heavily influenced by John Witherspoon, a Presbyterian minister and president of Princeton who personally directed Madison's graduate studies.¹⁷⁸ Madison's religious views are largely unknown; biographers variously claim that he sympathized with Deistic, liberal, or Unitarian positions.¹⁷⁹ Benjamin Franklin was a Deist, as was Thomas Paine.¹⁸⁰ George Washington was a conventional Anglican by observance, but had Deistic sympathies as well.¹⁸¹ Fisher Ames was a staunch Con-

178. Princeton was a center for dissenting Presbyterians who opposed ecclesiastical and political authority. The goal of Princeton University, as articulated by Witherspoon, was "to cherish the spirit of liberty, and free enquiry; and not only to permit, but even to encourage their right of private judgment" MILLER, *supra* note 9, at 89.

179. See *id.* at 91; ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 25 (1990).

180. MILLER, *supra* note 9, at 110, 236-40. Franklin listed the "essentials of every religion" as "the existence of the Deity, that he made the world and governed it by his providence, that the most acceptable service of God was the doing good to man, that our souls are immortal, and that all crime will be punished and virtue rewarded either here or hereafter." These, he wrote, were "found in all the religions we had in our country" BENJAMIN FRANKLIN, AUTOBIOGRAPHY, *quoted in id.* at 240.

181. MILLER, *supra* note 9, at 236.

gregationalist,¹⁸² and Rufus King an Episcopalian.¹⁸³ John Adams began as a Congregationalist but followed his local church when it became Unitarian in later years.¹⁸⁴ Jefferson is often called a Deist, although his religious views were highly individualistic and complex.¹⁸⁵ Isaac Backus began as a Congregationalist and later became a Separate Baptist and a leader of the Baptists in New England.¹⁸⁶ John Leland was a Baptist leader and preacher in Virginia.¹⁸⁷ Jonathan Mayhew, a Congregationalist preacher, was called "a Whig of the first Magnitude,"¹⁸⁸ and his sermon, delivered on January 30, 1749, "the morning gun of the American Revolution."¹⁸⁹

As a prominent historian of religious thought has written, in the events of this era, "[i]deas mattered. In fact, . . . [they] mattered supremely."¹⁹⁰ Ideas about the relationship of the individual to society, to government, and (if he or she so believed) to transcendent beings or transcendent principles, were undergoing rapid transformation.¹⁹¹ As in any complex matrix of human beings and human situations, the conclusions drawn from these circumstances were often in radical opposition.¹⁹² To Isaac

182. WINFRED E.A. BERNHARD, FISHER AMES: FEDERALIST AND STATESMAN 1758-1808, at 330 (1965).

183. ROBERT ERNST, RUFUS KING, AMERICAN FEDERALIST 15 (1968).

184. MILLER, *supra* note 9, at 237.

185. See, e.g., ADAMS & EMMERICH, *supra* note 179, at 24 (arguing that Jefferson held a "[D]eistic world view . . . tempered by . . . theism"). A descendant described Jefferson as

a conservative [U]nitarian He did not believe in the miracles, nor the divinity of Christ, nor the doctrine of the atonement, but he was a firm believer in Divine Providence, in the efficacy of prayer, in a future state of rewards and punishments, and in the meeting of friends in another world.

Thomas J. Collidge, *Jefferson in His Family*, in 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 176, at iv; see also CHARLES B. SANFORD, THE RELIGIOUS LIFE OF THOMAS JEFFERSON 5, *passim* (1984).

186. MILLER, *supra* note 9, at 211-12. Backus published 37 tracts in his lifetime, most of them on the subject of religious liberty. *Id.*

187. *Id.* at 120.

188. HUMPHREY, *supra* note 8, at 50 (quoting JOHN W. THORNTON, THE PULPIT OF THE AMERICAN REVOLUTION, at xix (1860)).

189. *Id.* at 51 (quoting THORNTON, *supra* note 188, at 43).

190. MILLER, *supra* note 9, at 139.

191. See *id.* at 139-43.

192. *Id.*

Backus, truth meant the "revealed doctrines of grace;"¹⁹³ for Jefferson or Madison, this concept was far more complex.¹⁹⁴ The desire to protect the moral fabric of society led to calls for religious tests for public office in some quarters and to calls for their abolition in others. Some groups, such as New England Congregationalists and Virginia Anglicans, endorsed tax support of religious institutions and other forms of establishment; others, such as Baptists, Quakers, Methodists, and many Presbyterians, claimed a right to radical separation of church and state.¹⁹⁵

Beneath these differences lay what has been called "the ideological ground music"¹⁹⁶—the foundational and emerging ideas that shaped the development and legacy of this era. These differences (as profound as they were) did not prevent a deeper congruence in the thought of these men about religious issues. This study attempts a broad identification of those underlying beliefs about religion and society, and religion and government, as they existed across a broad range of political and religious opinion.

All of these men struggled to reconcile the impulse of traditional religious doctrines with the Enlightenment. They struggled to reconcile emerging beliefs in the validity of individual human inquiry with competing beliefs that human reason alone is a fundamentally deficient source for moral or community values. Different religious groups reconciled these questions in different ways; views of the relative roles for human reason and the influence of the transcendent (if, indeed, they were seen as independent instrumentalities) were clearly different for different individuals. However, all shared a persistent conviction that there must be shared values in civil society and in government for the survival of either. The protection of the free inquiry necessary for the apprehension of these values was their overwhelming preoccupation.

The views of the "articulate reformers" of this era obviously are not the views of all persons on the questions that are the

193. *Id.* at 214 (quoting WILLIAM G. MCLOUGHLIN, ISAAC BACKUS AND THE AMERICAN PIETIST TRADITION (1967)).

194. *Id.* at 214.

195. *See id.* at 127.

196. *Id.* at 142.

focus of this study. Some religious groups clearly were more represented in the ranks of the articulate spokesmen than others; groups who shunned the public arena, such as Quakers and Schwenkfelders, or those who were largely deprived of political power or social status, such as Jews and Roman Catholics, had few, if any, spokesmen whose views were recorded. The views of many segments of society, such as women, slaves, the working poor, the middle class—basically, all who were not part of the white, male, affluent, well-educated elite—were rarely recorded and are largely, if not entirely, lost. This study chronicles the ideas that were dominant in the circles of those who held political and economic power, and that were articulated by those who are now seen as the authoritative spokesmen of that era. These men were, through training, accident of birth, or otherwise, those whose legacy was recorded and who have (for better or worse) articulated our ideological heritage. For those reasons, it is their views that I examine here.

Several comments should be made, at the outset, about the methodology employed and the boundaries of this study. There is always an inherent danger in building an understanding of ideas through the piecing together of small portions of the thought of many individuals; not every word uttered by every individual was surely intended to be that person's ultimate statement on the subject, let alone the ultimate statement of the age.¹⁹⁷ However, consistent themes appear repeatedly in the works of particular individuals and in the writings of this period; it is the sketching of those broad themes that will be attempted here.

An objection could also be made that the approach of this study isolates ideas from their more extensive historical and

197. Henry May discussed the pervasive tendency in intellectual history to talk about the movement of ideas in too general and sweeping a manner. . . . If, in any extended treatment of the Enlightenment, one says that Newtonian ideas spread, or scepticism increased, or religion declined, one must say when, where, and among whom. Obviously, there are great differences between Protestant and Catholic Europe, in America among North and South, East and West, between city and country everywhere, among classes and occupations.

MAY, *supra* note 13, at 132.

biographical settings and deprives them of needed context. To some extent, this objection can be answered by the silent knowledge that it invites us down an endless path. As Henry May has written, attempts to make the recounting more complete might render the picture "richer and more complex but can never reproduce reality. In the long run, . . . the [intellectual] historian is most like an artist, and history is irreducibly a kind of literature."¹⁹⁸

Perhaps a more fundamental response to this objection is that the importance and usefulness of these ideas lies elsewhere. The fact that the ideas of this generation cannot be portrayed with certainty does not necessarily render them any less valuable in our consideration of the same issues today. The ideas that emerge can be useful catalysts for our own thinking, even if their historicity, in the strictest sense, cannot be known. My intention is not the making of an originalist argument. Even if we could determine—with the requisite certitude—that a particular view of the relationship between religion and society, or religion and government, predominated in the Founding Era, that would not mean that we must use this view in constitutional interpretation or that it is, in fact, the only viable resolution of these issues. Rather, this study is an attempt to present ideas that prevailed in a certain period of our past; and to see whether those ideas might not, in the end, have something important to tell us as we consider the continuing issues of our own time.

B. The Background Against Which These Questions Arose: Intolerance, Persecution, and State Support for Religious Establishments

Although many colonists arrived on North American shores to pursue religious freedom, rarely did they extend that concept to others. The colonists came to these shores, for the most part, with impressions of church-state relationships that mirrored those in Europe.¹⁹⁹ Because church and state in Europe were

198. *Id.* at x.

199. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 247 (1967); LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 71-72 (1967); SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 4 (1902).

often highly integrated institutions,²⁰⁰ colonial arrangements usually reflected this philosophy as well. The fact that many colonists had suffered under such regimes did not deter them; "in their view, that suffering was a consequence, not of a vicious principle, but of a wicked application of a principle which was very right and necessary."²⁰¹

The result of this approach was religious oppression or persecution in virtually all of the American colonies.²⁰² The Anglican establishment in Virginia was described by Jefferson in many of his writings. The Anglican establishment began with colonization in 1607. "The first settlers of this colony were Englishmen, loyal subjects to their king and church" ²⁰³ Upon settlement of the colony, it was divided into parishes, "in each of which was established a minister of the Anglican church, endowed with a fixed salary, in tobacco, a glebe house and land with the other necessary appendages."²⁰⁴ To meet the expenses of this arrangement, "all the inhabitants of the parishes were

200. In the words of Sanford Cobb:

That questions as to the relation between things religious and things political have occupied large space in the history of Europe, is evident to the most casual reader. It will be difficult, indeed, to find any other question so important, so insistent for solution, so widely affecting society, and so efficient in guiding historic development. Thus, in very emphatic words, Ranke declares, "The whole life and character of Western Christendom consists of the constant action and counteraction of church and state." From the beginning of the Christian state, it was assumed that, among its first duties and missions was to care for the interests of the church or the submission to its demands

COBB, *supra* note 199, at 19.

201. *Id.* at 67. The transplantation of European ideas of church-state relations to the New World is described in *Everson v. Board of Educ.*, 330 U.S. 1, 9 (1947):

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments

Id.

202. See COBB, *supra* note 199, at 68, 69-71; THOMAS CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT passim* (1986); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 42-45 (1985); PFEFFER, *supra* note 199, at 71-90, 108.

203. THOMAS JEFFERSON, *AUTOBIOGRAPHY*, reprinted in 1 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 1, 56.

204. *Id.* at 56-57.

assessed, whether or not they were members of the established church."²⁰⁵

During the seventeenth century, the Virginia Assembly passed a series of acts to enforce religious conformity and to secure the position of the established church.²⁰⁶ Acts passed in 1659, 1662, and 1693 made it a criminal act for parents to refuse to baptize children; prohibited the unlawful assembly of Quakers; made it a criminal act for the master of any vessel to bring a Quaker into the state; and subjected Quakers who did arrive to banishment with the penalty of death for the third return.²⁰⁷ By an Act of the Assembly of 1705, a person brought up in the Christian religion who denied the being of a God or the Trinity, denied the Christian religion to be the true religion, denied the scriptures to be of divine authority, or asserted that there are more gods than one was punished as follows: for the first offense, by incapacity to hold any office of employment, ecclesiastic, civil, or military; and for the second offense, by disability to sue, to take any gift or legacy, to be a guardian, executor, or ad-

205. *Id.* at 57.

206. For instance, in 1612 Governor Thomas Dale decreed that "[t]o speak impiously of the Trinity or of one of the Divine Persons, or against the known articles of the Christian faith," was punishable by death. PFEFFER, *supra* note 199, at 77. The same penalty was decreed for "blaspheming God's holy Name." *Id.* at 78. If an individual should "curse or 'banne,'" the penalty for the first offense was to be "severe;" for the second, "a bodkin should be thrust through the tongue;" for further offenses, the penalty was death. *Id.* If an individual should say or do anything "to the derision or despight of God's holy word" or "in disrespect to any Minister," the offender should be "openly whipt 3 times, and to ask public forgiveness in the assembly of the congregation, 3 several Sabbath daies." *Id.* For nonattendance at religious services, the penalties were as follows: for the first offense, the "stoppage of allowance;" for the second, whipping; for the third, service in the galleys for six months. *Id.* For Sabbath breaking, the penalties were: for the first offense, stoppage of allowance; for the second, whipping; for the third, death. *Id.* In addition, every person in the colony was required to repair to the minister for examination in the faith. If found to be "unsound," he was to be instructed. If he refused to go, he would be whipped "every day until he makes acknowledgement." *Id.*

On appeal to England, these "Laws Divine, Moral and Martial" were abrogated. *Id.* However, fines for nonattendance at church services remained; the payment of tithes was compulsory; all Anglican ministers had to "conform themselves in all things according to canons of the Church of England;" Puritans and Quakers were banned; and Catholics were ineligible to hold public office. *Id.*

207. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1788), *reprinted in* THE PORTABLE THOMAS JEFFERSON 23, 208 (Merrill D. Peterson ed., 1975).

ministrator of any estate, and by three years' imprisonment without bail.²⁰⁸ In the counties of Orange, Spotsylvania, and Culpepper, Baptist preachers were persecuted, beaten, and imprisoned.²⁰⁹ In 1774, Madison wrote in a letter to William Bradford:

That diabolical hell conceived principle of persecution rages among some There are at this [time] in the adjacent County not less than 5 or 6 well meaning men in close Goal for publishing their religious Sentiments which in the main are very orthodox. . . . I have squabbled and scolded abused and ridiculed so long about it, . . . that I am without common patience. So I [must beg you] to pity me and pray for Liberty of Conscience [for us].²¹⁰

These laws persisted, despite the fact that two-thirds of the people of Virginia were religious dissenters by the time of the Revolution.²¹¹

When the first republican legislature met in Virginia in 1776, there were, in the words of Jefferson, "petitions to abolish this spiritual tyranny."²¹² However, that year saw only the repeal of laws that rendered criminal the maintenance of certain religious opinions, the failure to attend church, and the exercise of non-conforming modes of worship.²¹³ The famous Virginia Declaration of Rights, which was written by George Mason, edited by Madison, and passed by the Virginia Assembly on June 12, 1776, exempted dissenters from financial support of the established church but left other laws intact.²¹⁴

208. *Id.* at 210.

209. See LEWIS P. LITTLE, *IMPRISONED PREACHERS AND RELIGIOUS LIBERTY IN VIRGINIA* 127-40 (1938).

210. Letter from James Madison to William Bradford (Jan. 27, 1774), in 1 *THE PAPERS OF JAMES MADISON* 104, 106 (William T. Hutchinson and William M.E. Rachal eds., 1962).

211. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* (1788), reprinted in *THE PORTABLE THOMAS JEFFERSON*, *supra* note 207, at 23, 209.

212. THOMAS JEFFERSON, *AUTOBIOGRAPHY*, reprinted in 1 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 1, 57.

213. *Id.* at 58.

214. See 1 STOKES, *supra* note 17, at 304-11. This declaration began, "An Act for exempting the different societies of Dissenters from contributing to the support and maintenance of the church as by law established, and its ministers, and for other

The persecution of dissenters in Puritan New England has been well documented elsewhere.²¹⁵ During the colonial era, Puritan Massachusetts banished Quakers from the state on pain of death.²¹⁶ When four Quaker women insisted on returning, they were burned at the stake.²¹⁷ Dissent from the established Congregational church was sedition and a "sin against God."²¹⁸ In 1673, Uriah Oakes of Harvard College declared that, "I look upon unbounded Toleration as the first-born of all abominations."²¹⁹ Sanford Cobb wrote that "spiritual inquisition and tyranny operated with more or less strictness and severity in all of the [New England] colonies, except Rhode Island."²²⁰ All but Rhode Island established the Congregational church.²²¹ At the time of the Revolution, Massachusetts, Connecticut, and New Hampshire retained religious establishments supported by taxation, although a taxpayer was permitted (at least in principle) to choose the religious denomination that was to receive his tax.²²² The greatest religious liberty existed in Rhode Island, which was considered to be a refuge for dissenters.²²³ However, many of the socio-religious norms that existed elsewhere in New England existed there as well.²²⁴ For instance, citizenship and eligibility to hold public office were restricted by law to Protestants.²²⁵ These laws were unevenly enforced, and some Jews and Catholics were admitted to citizenship by special acts of the

purposes therein mentioned." Virginia Declaration of Rights, *in id.*, at 304. It was not until 1779 that Jefferson's *Bill for Establishing Religious Freedom* was finally passed. See PFEFFER, *supra* note 199, at 109-10; THOMAS JEFFERSON, *AUTOBIOGRAPHY*, reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 176, at 59.

215. See, e.g., CURRY, *supra* note 202, at 4-28 (discussing "deep cooperation" between clerics and public officials in maintaining religious orthodoxy).

216. *Id.* at 21-26.

217. Norman Cousins, *Introduction* to "IN GOD WE TRUST": THE RELIGIOUS BELIEFS AND IDEAS OF THE FOUNDING FATHERS 11 (Norman Cousins ed., 1958) [hereinafter "IN GOD WE TRUST"]; CURRY, *supra* note 202, at 21-26.

218. COBB, *supra* note 199, at 68.

219. 2 JOSEPH B. FELT, *ECCLESIASTICAL HISTORY OF NEW ENGLAND; COMPRISING NOT ONLY RELIGIOUS, BUT ALSO MORAL, AND OTHER RELATIONS* 506 (1862).

220. COBB, *supra* note 199, at 69.

221. *Id.* at 71.

222. PFEFFER, *supra* note 199, at 141.

223. See CURRY, *supra* note 202, at 19-21.

224. *Id.* at 19.

225. *Id.* at 90-91.

State Assembly.²²⁶

New York began with the establishment of the Dutch Reformed Church.²²⁷ Financial support of this church was compulsory, baptism in this church was required for all children, and Lutherans, Baptists, and Quakers were subject to persecution.²²⁸ Upon the surrender of "New Amsterdam" to the English in 1664, a system of "multiple establishments" was erected.²²⁹ In his "Instructions" to the colony, the Duke of York decreed:

In all the territories of his Royal Highness liberty of conscience is allowed, provided such liberty is not converted to licentiousness or the disturbance of others in the exercise of the protestant religion. Every township is obliged to pay their minister, according to such agreement as they shall make with him, and no man shall refuse his proportion; the minister being elected by the major part of the householders, inhabitants of the town.²³⁰

This decree further mandated that a place of worship should be erected in every parish; that the church and its minister be supported by a public tax; and that "every inhabitant shall contribute to all charges both in Church and State."²³¹

In 1683, the Colonial Assembly of New York adopted a "Charter of Liberties" which stated that:

No person professing faith in God by Jesus Christ is to be molested or called in question for any differences of opinion in matters of religion, [and] the churches already in New York do appear to be privileged Churches. . . . Provided also that all other Christian Churches, that shall hereafter come and settle in the province, shall have the same privileges.²³²

226. *Id.* at 85, 90-91; see also MORTON BORDEN, *JEWS, TURKS AND INFIDELS* 13 (1984).

227. PFEFFER, *supra* note 199, at 79.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 79-80.

232. *Id.* at 80.

Further relief for dissenting Christians was provided by a declaration of the state convention in 1777, which expressly rescinded all laws that "[m]ight be construed to establish or maintain any particular denomination of Christians or their ministers."²³³ However, Roman Catholics were excluded from citizenship by a declaration that all persons naturalized by the state must abjure all foreign allegiances, "ecclesiastical as well as civil."²³⁴ Jews and other groups merited no mention at all.

Maryland, an originally Roman Catholic colony, is often cited as an example of relative religious tolerance. However, it incorporated many oppressive elements in its laws. The famous Act of Toleration of 1649 in fact imposed a penalty of death and forfeiture of estate on any person who

shall hence forth blaspheme God, . . . or deny our Savior Jesus Christ to be the Son of God, or shall deny the Holy Trinity the Father the Son and the Holy Ghost, or the Godhead of any of the said three persons of the Trinity . . . or shall use or utter any reproachful speeches, words or language concerning the Holy Trinity, or any of the three persons therein.²³⁵

Utterance of "reproachful words and speeches" about the Virgin Mary, or the "holy apostles or evangelists," was punishable by fine, whipping, imprisonment, and banishment.²³⁶ Fines or imprisonment were prescribed for profaning the Lord's Day.²³⁷ Freedom of belief and conscience was reserved for those "professing to believe in Jesus Christ."²³⁸ Later, when the Church of England was established in Maryland, public exercise of Catholicism and the admission of Roman Catholic immigrants were forbidden.²³⁹ The Declaration of Rights of 1776 limited equal "protection in their religious liberty" to "persons professing the Christian religion."²⁴⁰ It provided for the laying of "a general

233. COBB, *supra* note 199, at 502.

234. *Id.*

235. PFEFFER, *supra* note 199, at 83.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 84.

240. MD. CONST. of 1776, A Declaration of Rights, Etc., XXXIII, in 3 FRANCIS N.

and equal tax, for the support of the Christian religion," with individuals able to choose the church or the poor as the recipient.²⁴¹

In other middle-Atlantic colonies, conditions were similar. The New Jersey Constitution of 1776 provided that each person shall have "the inestimable privilege of worshipping God according to the dictates of his own conscience," but public office was limited to those persons "professing a belief in the faith of any Protestant sect."²⁴² The Pennsylvania Constitution of 1776 restricted civil rights to persons "who acknowledge the being of a God,"²⁴³ and required the following oath for public office: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration."²⁴⁴ The Delaware Constitution, ratified in 1776, required all state officers to swear a Trinitarian oath and declare their belief in the divine inspiration of the Scriptures.²⁴⁵

It has been said that in the southern colonies, religious rules were observed more in the breach than in the practice. Most Revolutionary-Era laws, however, reflected the intolerance that existed elsewhere. The South Carolina Constitution of 1778 granted toleration to "[a]ll persons and religious societies, who acknowledge that there is one God, and a future state of reward

THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1686, 1689 (1909).

241. *Id.*

242. N.J. CONST. of 1776, XVIII-XIX, in 5 THORPE, *supra* note 240, at 2594, 2597.

243. PA. CONST. of 1776, A Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania, II, in 5 THORPE, *supra* note 240, at 3081, 3082.

244. *Id.*, Plan or Frame of Government for the Commonwealth or State of Pennsylvania, § 10, in 5 THORPE, *supra* note 240 at 3084, 3085. The Pennsylvania Constitution of 1790 extended the right to hold office to all who believed in "God and in a future state of rewards and punishments." PA. CONST. of 1790, art. IX, § 4, in 5 THORPE, *supra* note 240, at 3092, 3100.

245. DEL. CONST. of 1776, art. 22, in 1 THORPE, *supra* note 240, at 562, 566. This oath was: "I, [name], do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testaments to be given by divine inspiration." *Id.*

and punishment, and that God is publicly to be worshipped"²⁴⁶—a formulation that seemed to include the protection of Jews and Catholics. However, it further provided that "[t]he Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State," with "[a]ll denominations of Protestants . . . enjoy[ing] equal religious and civil privileges."²⁴⁷ North Carolina denied public office to any person, "who shall deny the being of God or the truth of the Protestant religion, or the divine authority of either the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State"²⁴⁸ Georgia, in its Constitution of 1777, declared that all members of the legislature "[shall] be of the Protestant religion."²⁴⁹

The existence of these establishments did not remain unchallenged; there was deliberate opposition to them before the Revolution, although it was scattered and ineffective.²⁵⁰ Dissenters often chose to risk imprisonment and loss of property rather than to submit to what they felt was spiritual tyranny.²⁵¹ As the result of opposition, laws requiring religious conformity often were not enforced,²⁵² and formal or informal systems of choice

246. S.C. CONST. of 1778, XXXVIII, in 6 THORPE, *supra* note 240, at 3248, 3255-56.

247. *Id.* at 3256. A religious society was entitled "to be incorporated and esteemed as a Church of the established religion," if it adhered to the following tenets:

1. That there is one Eternal God, and a future state of rewards and punishments.
2. That God is publicly to be worshipped.
3. That the Christian Religion is the true religion.
4. That the holy Scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice.
5. That it is lawful and the duty of every man being thereunto called by those who govern, to bear witness to the truth.

Id.

248. N.C. CONST. of 1776, The Constitution, or Form of Government, Etc., XXXII, in 5 THORPE, *supra* note 240, at 2787, 2793.

249. GA. CONST. of 1777, art. VI, in 2 THORPE, *supra* note 240, at 777, 779.

250. See, e.g., 1 STOKES, *supra* note 17, at 358-446; BORDEN, *supra* note 226, *passim*.

251. See BAILYN, *supra* note 199, at 247-49. At the outbreak of the Revolution, 18 dissenters who refused to make payments to the established church were in one Massachusetts jail. PFEFFER, *supra* note 199, at 92.

252. In Massachusetts, for instance, prosecutions for religious offenses numbered

or exemption from religious taxation were also common.²⁵³ Dissenting groups increasingly questioned the right of any religious group to claim for itself the exclusive right to government support.²⁵⁴

Resistance to religious establishments was accelerated by the Great Awakening, a religious revival movement which began in the 1730s and spread throughout the American colonies.²⁵⁵ Itinerant preachers traveled throughout the land, creating religious fervor in the populace and provoking challenges to established religious beliefs and organizations.²⁵⁶ "New Light" evangelical enthusiasts were produced in all major religious denominations.²⁵⁷ Presbyterianism was split into the Synod of Philadelphia, dominated by "Old Side" opponents of the Awakening, and the synod of New York, whose members were "New Side."²⁵⁸ In Connecticut, the Congregational Church fractured into "Old Lights," "New Lights," and "Separate" groups.²⁵⁹ In Pennsylvania, New Jersey, and throughout New England, Baptist groups grew in response to the revival.²⁶⁰ Although most widespread in the Northeast, the Great Awakening also had substantial impact on religious thought and diversity in Virginia

about 24 per year until the mid-1780s. After that, prosecutions for missing church on Sunday ceased, and only the offense of working or travelling on Sunday was prosecuted. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 110 (1975). In Virginia, laws requiring nonconformist organizations to register with the government were often ignored, and some dissenting Protestants and Roman Catholics held public office. See BAILYN, *supra* note 199, at 248-49.

253. See *id.* at 248-49; COBB, *supra* note 199, at 483-509.

254. See BAILYN, *supra* note 199, at 249-50. Resistance to established churches and to English political power were often intermingled. See *id.* at 252-67. One Revolutionary Era pamphlet declared "Civil and Ecclesiastical Slavery" to equal "the Purchase of Christ." JONATHAN PARSONS, *MASSACRE DAY SERMON* (Newburyport, 1774), quoted in *id.* at 247.

255. See CURRY, *supra* note 202, at 95-96.

256. *Id.*

257. *Id.*

258. See ALAN HEIMERT, *RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION* 2-3 (1966); G. ADOLPH KOCH, *REPUBLICAN RELIGION: THE AMERICAN REVOLUTION AND THE CULT OF REASON* 9-11 (1933).

259. HEIMERT, *supra* note 258, at 2-3.

260. *Id.*

and the Carolinas.²⁶¹

The Great Awakening heightened sectarian differences and opposition to established religions and their state-supported structures.²⁶² Bitter rifts developed even among those in the Protestant evangelical ranks.²⁶³ Discontent with religious establishments was fueled by the growth of religious (particularly Protestant) diversity. Increasing numbers of dissenters meant increasing clamor for religious liberty. As Bernard Bailyn has written, the movement for disestablishment "was borne by the radical sectarians: New Light Presbyterians, Separate Baptists, and Strict Congregationalists; with the result that the most advanced pre-Revolutionary arguments for disestablishment—arguments that would eventually bear fruit in all the governments of the new nation—were unstable compounds of narrow denominationalism and broad libertarianism."²⁶⁴

The existence of choice plans, or the availability of registry as a dissenting denomination, did not save these establishment schemes in the eyes of dissenters.²⁶⁵ Dissenters "resented hav-

261. *See id.*

262. *See* BAILYN, *supra* note 199, at 248-49; BLOCH, *supra* note 18, at 13-15, 82 (discussing the Great Awakening and its linkage of the concepts of political liberty and "true religion"). "As the great wave of religious enthusiasm [of the Great Awakening] subsided in the 1750's it left in its wake a sensitivity to those very moral issues that formed the religious dimension of radical whig ideology." *Id.* at 15.

263. *See* HEIMERT, *supra* note 258, at 122.

264. BAILYN, *supra* note 199, at 257. Bailyn describes the arguments made by dissenters in Virginia as independence approached:

[D]issenters . . . urged the granting of "equal privilege"—in religion as in civil affairs—to all . . . "[T]hat without delay all church establishments might be pulled down, and every tax upon conscience and private judgment abolished." . . . Still others condemned establishments as "inconsistent with the spirit of taxation which supposes those on whom impositions are laid to be benefited thereby." . . . [Presbyterians] stated their absolute opposition to permitting any group to enjoy "exclusive or separate emoluments or privileges . . . to the common reproach and injury of every other denomination." The only just, reasonable, and effective solution was to abolish "all partial and invidious distinctions" at once and for all time.

Id. at 260-61 (quoting 2 GEORGE BRYDON, VIRGINIA'S MOTHER CHURCH (1974) and Journal of the House of Delegates of Virginia, Anno Domini, 1776 (1828)) (footnote omitted).

265. The actual end of "establishments with choice" plans in Virginia, and the death knell for them elsewhere, came with the defeat of the "Bill Establishing a

ing to receive freedoms as favors from those with the right to choose the beneficiaries" or to say "what was 'regular' enough to be tolerated."²⁶⁶ Isaac Backus wrote that Massachusetts "has declared the Baptists to be irregular, therefore the secular power still *force* them to support the worship which they conscientiously dissent from."²⁶⁷ Backus concluded that "many who are filling the nation with the cry of LIBERTY and against *oppressors* are at the same time violating that dearest of all rights, LIBERTY of CONSCIENCE."²⁶⁸ Apparently, skeptics had some basis for their views. When Baptists refused to pay taxes to support the established Congregational church in one Massachusetts town, their property was confiscated on the ground that their sect was "fluctuating and unstable" and "a sink for some of the filth of Christianity in this part of the county." There was no protection, in the eyes of local authorities, for sects who "cannot, in any tolerable sense, answer the valuable ends of religion to the community."²⁶⁹

The struggle against religious persecution and state establishments of favored religious groups had clearly begun by the time of the Revolution. The questions that remain to be examined are

Provision for Teachers of the Christian Religion" in 1786. This bill required all persons to make an annual contribution for the support of the Christian religion; for some Christian church, denomination, or communion of Christians; or for some form of Christian worship. The bill, in its final form, allowed the nonreligious taxpayer to elect that his tax be used for the encouragement of "seminaries of learning" within the counties where those sums were collected. See PFEFFER, *supra* note 199, at 109-10. It was in opposition to this bill that Madison's famous *Memorial and Remonstrance* was written. See JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in 2 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PUBLISHED 183 (Gaillard Hunt ed., 1906) [hereinafter THE WRITINGS OF JAMES MADISON]; see also MEMORIAL BY THE HANOVER PRESBYTERY (1785), quoted in PFEFFER, *supra* note 199, at 110-11 ("Religion is altogether personal, and the right of exercising it unalienable; and it is not, cannot and ought not to be resigned to the will of the society at large; and much less to the Legislature which derives its authority wholly from the consent of the People . . .").

266. BAILYN, *supra* note 199, at 262.

267. *Id.* at 263.

268. *Id.*

269. 4 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 1036, 1040, 1038 (1869), quoted in BAILYN, *supra* note 199, at 265.

what deeper intellectual and religious values motivated these struggles, and what their implications for different conceptions of "free exercise" and the "separation" of church and state might be.

C. The Core Freedom: The Primacy of Freedom of Conscience

Of all of the "fundamental rights" heralded during the Founding Era, calls for freedom of conscience were the most insistent and the most intense. Despite the history of religious persecution in the colonies, persons from all geographic regions and religious affiliations called for protection of the "unalienable rights" of conscience. "If . . . all men are to be considered as entering into Society on equal conditions," then "[a]bove all are they to be considered as retaining an 'equal title to the free exercise of Religion according to the dictates of conscience.'"²⁷⁰ A memorial drafted by a committee of the First Continental Congress stated: "The free exercise of private judgment, and the unalienable rights of conscience, are of too high a rank and dignity to be submitted to the decrees of councils, or the imperfect laws of fallible legislators."²⁷¹ "[T]he kingdom of Christ is not of this world, and religion is a concern between God and the soul with which no human authority can intermeddle; . . . we claim and expect the liberty of worshipping God according to our consciences"²⁷² George Washington wrote to the Baptists that "every man, conducting himself as a good citizen, and being accountable to God alone for his religious opinions, ought to be protected in worshipping the Deity according to the dictates of his own conscience."²⁷³

270. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 183, 186. In an essay written in 1792, Madison stated that "[c]onscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and inalienable right." JAMES MADISON, PROPERTY, reprinted in 6 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 101, 102.

271. SAMUEL DAVIS, ET AL., MEMORIAL, quoted in ALVAH HOVEY, A MEMOIR OF THE LIFE AND TIMES OF THE REV. ISAAC BACKUS 204-05 (1858).

272. *Id.* at 210.

273. George Washington, Address to the General Committee, Representing the United Baptist Churches in Virginia (May, 1789), in 12 THE WRITINGS OF GEORGE WASHINGTON; BEING HIS CORRESPONDENCE, ADDRESSES, MESSAGES, AND OTHER PAPERS,

In their rebellion in New England, strict Congregationalists asserted that liberty of conscience is an "unalienable right of every rational creature."²⁷⁴ State constitutions called for the protection of liberty of conscience,²⁷⁵ as did state ratifying conventions for the Federal Constitution.²⁷⁶ Calls for freedom of conscience were made by evangelical and traditional religious

OFFICIAL AND PRIVATE, SELECTED AND PUBLISHED FROM THE ORIGINAL MANUSCRIPTS; WITH A LIFE OF THE AUTHOR, NOTES, AND ILLUSTRATIONS 155 (Jared Sparks ed., 1848) [hereinafter *THE WRITINGS OF GEORGE WASHINGTON*]. Washington noted that "if I could now conceive that the general government might ever be so administered as to render the liberty of conscience insecure, . . . no one would be more zealous than myself to establish effectual barriers against the horrors of [this] spiritual tyranny" *Id.*

274. See BAILYN, *supra* note 199, at 249.

275. See, e.g., N.J. CONST. of 1776, XVIII, in 5 THORPE, *supra* note 240, at 2594, 2597 (declaring that every person has "the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience"); PA. CONST. of 1776, A Declaration of Rights of the Inhabitants of the Commonwealth or State of Pennsylvania, II, in 5 THORPE, *supra* note 240, at 3081, 3082 ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . .").

276. See, e.g., Statement of Rev. Payson, Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Jan. 30, 1788), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA IN 1787 120 (Jonathan Elliot ed., 1836) [collection as a whole hereinafter *ELLIOT'S DEBATES*] (" . . . God alone is the God of the conscience, and . . . attempts to erect human tribunals for the consciences of men are impious encroachments upon the prerogatives of God."); Statement of Mr. Tredwell, Debates in the Convention of the State of New York on the Adoption of the Federal Constitution (July 2, 1788), in 2 *ELLIOT'S DEBATES*, *supra*, at 401 ("[H]ere is no bill of rights, no proper restriction of power; our lives, our property, and our consciences, are left wholly at the mercy of the legislature . . ."). These concerns led to proposed amendments to the Constitution which focused on the preservation of conscience. See, e.g., Supplement to the Journal of the Federal Convention (Ratification by the State of Virginia) in 2 *ELLIOT'S DEBATES*, *supra*, at 327, 327 ("[A]mong other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States."); Supplement to the Journal of the Federal Convention (Ratification by the State of New York), in 2 *ELLIOT'S DEBATES*, *supra*, at 328, 328 ("[T]he people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience . . ."); Supplement to the Journal of the Federal Convention (Ratification by the State of Rhode Island), in 2 *ELLIOT'S DEBATES*, *supra*, at 334, 334 ("[R]eligion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction . . . ; and therefore all men have a natural, equal, and unalienable right to the exercise of religion according to the dictates of conscience . . .").

groups, Old Lights and New Lights, Strict Congregationalists and Anglicans, Jews, Quakers, and Roman Catholics. It has been written that at the time of the drafting of the Constitution, the idea of freedom of conscience knew no opposition.²⁷⁷

The meaning of "freedom of conscience" differed for different groups. Older, main-line Protestant religious groups defined it in terms of individual freedom of thought; evangelicals believed that it also included such things as the right to hear the minister of one's choice.²⁷⁸ The fundamental concept, however, incorporated certain ideas that crossed religious lines. For virtually all groups, conscience was seen as a distinctly rational process; it involved the exercise of human reason, judgment, and understanding. Because of its involvement with human rational processes, conscience involved elements of free will, choice, and (ultimately) human responsibility. Liberty of conscience in matters of religion left the individual alone, and accountable; it "consist[ed] in the absolute and unrestrained exercise of . . . religious opinions and duties . . . without the control or intervention of any human power or authority whatsoever."²⁷⁹ The responsibility imposed by conscience was often stated in distinctly religious terms. Jefferson wrote that in matters of conscience, "[w]e are answerable . . . to our God."²⁸⁰ John Adams wrote that "[t]he most abandoned scoundrel that ever existed, never Yet Wholly extinguished his Conscience, and while Conscience remains there is some Religion."²⁸¹ The rootedness of conscience in religious ideas is apparent in early characterizations of the First Amendment's guarantees. In a private letter, Fisher

277. See BERNs, *supra* note 7, at 2-10.

278. See HEIMERT, *supra* note 258, at 206-09.

279. St. George Tucker, *quoted in* THEODORE A. SCHROEDER, CONSTITUTIONAL FREE SPEECH DEFINED AND DEFENDED 122-23 (1919).

280. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1788), *reprinted in* THE PORTABLE THOMAS JEFFERSON, *supra* note 207, at 210. Elsewhere, Jefferson wrote that ". . . I have ever thought religion a concern purely between our God and our consciences, for which we were accountable to Him . . ." Letter from Thomas Jefferson to Mrs. Harrison Smith (Aug. 6, 1816), *in* 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 176, at 59, 60.

281. Letter from John Adams to Thomas Jefferson (Apr. 19, 1817), *in* THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 509 (Lester J. Cappon ed., 1988) [collection as a whole hereinafter THE ADAMS-JEFFERSON LETTERS].

Ames described the religious guarantees of the First Amendment as protecting the "rights of conscience."²⁸² James Madison, when later arguing that the Alien and Sedition Acts violated First Amendment guarantees, referred to those guarantees as "the liberty of conscience and of the press."²⁸³

The reasons for the perceived paramount importance of freedom of conscience were several. First, freedom of conscience was believed to be important to religion: not only for the practical protection of minority religious sects, but also for the protection of the very process of religious belief and conviction. The principle of voluntariness, or the need for personal enlightenment and the consultation of conscience in the discovery of religious truth, was shared by old line and evangelical religious groups.²⁸⁴ Jonathan Mayhew told the members of his congregation that they must make their determinations about the existence of God after "we have impartially examined the matter, and see the evidence on one side or the other."²⁸⁵ Mayhew argued that Christianity had three basic principles: "THAT there is a natural difference between truth and falsehood, right and wrong"; "THAT men are

282. Letter from Fisher Ames to George Richards Minot (June 12, 1789), in 1 WORKS OF FISHER AMES, WITH A SELECTION FROM HIS SPEECHES AND CORRESPONDENCE 53, 54 (Seth Ames ed., 1864) [collection as a whole hereinafter WORKS OF FISHER AMES] (" . . . Mr. Madison has inserted, in his amendments, the increase of representatives, each State having two at least. The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people. Freedom of the press, too."). A similar understanding is reflected in a letter by Richard Henry Lee of Virginia, which criticized the proposed Federal Constitution as having "no restraint, in the form of a bill of rights, to secure . . . that residuum of human rights which is not intended to be given up to society, and which, indeed, is not necessary to be given for any social purpose. The rights of conscience, the freedom of the press, and the trial by jury, are at mercy." Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), in 1 ELLIOT'S DEBATES, *supra* note 276, at 503, 503.

283. James Madison, Report on the Resolutions (Feb. 7, 1799), in 6 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 341, 400. He similarly referred to the Virginia Bill of Religious Freedom as "a permanent barrier against future attempts on the rights of conscience . . ." Letter from James Madison to George Mason (July 14, 1826), quoted in THE COMPLETE MADISON: HIS BASIC WRITINGS 299 n.1 (Saul K. Padover ed., 1953) [collection as a whole hereinafter THE COMPLETE MADISON].

284. See HEIMERT, *supra* note 258, at 2-12, 397.

285. Jonathan Mayhew, *The Right and Duty of private Judgment asserted*, in JONATHAN MAYHEW, SEVEN SERMONS UPON THE FOLLOWING SUBJECTS . . . PREACHED AT A LECTURE IN THE WEST MEETING-HOUSE IN BOSTON, 1748, at 42, 44 (1750).

naturally endowed with faculties proper for the discerning of these differences"; and "THAT men are under [an] obligation to exert these faculties; and to judge for themselves in things of a religious concern."²⁸⁶ He argued that all should endeavor to discover the true religion, "let it be what it will."²⁸⁷ In a memorial presented to the Continental Congress in 1774, an association of Baptists argued that "[t]he care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but pure and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God."²⁸⁸

The understanding of human reason in a religious context varied. Some seemed to grant reason a divine or revelatory status,²⁸⁹ others viewed it as a purely human instrumentality to be used in the discovery of religious truth.²⁹⁰ Jonathan

286. Jonathan Mayhew, *Difference betwixt Truth and Falsehood, Right and Wrong*, in MAYHEW, *supra* note 285, at 5.

287. Jonathan Mayhew, *Objections Considered*, in MAYHEW, *supra* note 285, at 72; see also CURRY, *supra* note 202, at 100-01.

288. MEMORIAL PRESENTED BY THE BAPTISTS TO THE CONTINENTAL CONGRESS IN 1774, *reprinted in* PFEFFER, *supra* note 199, at 102.

289. The fusion of human reason and divine revelation is evident, for instance, in the following statement by Adams: "The human Understanding is a revelation from its Maker which can never be disputed or doubted. There can be no Scepticism, Pyrrhonism or Incredulity or Infidelity here. No Prophecies, no Miracles are necessary to prove this celestial communication." Letter from John Adams to Thomas Jefferson (Sept. 14, 1813), in THE ADAMS-JEFFERSON LETTERS, *supra* note 281, at 372, 373.

290. The use of a fallible, human instrumentality to discover religious truth presented an inherent paradox. Although human reason was susceptible to error (as evidenced by "false" religions and other misapprehensions of truth), it was still believed that only through the process of reason could errors be corrected. Jefferson, for instance, wrote that "[r]eason and free inquiry are the only effectual agents against error. Give a loose to them, they will support the true religion, by bringing every false one to their tribunal, to the test of their investigation." He went on to acknowledge, however, that "[m]illions of innocent men, women, and children . . . have been burnt, tortured, fined, imprisoned . . ." in a futile effort to enforce Christian uniformity. "[I]f there be but one right [religion], . . . we should wish to see the . . . wandering sects gathered into the fold of truth. But . . . we cannot effect this by force. Reason and persuasion are the only practicable instruments." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1788), *reprinted in* THE PORTABLE THOMAS JEFFERSON, *supra* note 207, at 23, 211-12; see also Letter from Thomas Jefferson to Edward Everett (1823), *quoted in* 1 STOKES, *supra* note 17, at 396 ("[I]f new [religious] sects arise with absurd opinions or over-heated imaginations, the

Mayhew expressed both concepts. He wrote that "[i]t is by our reason that we are exalted above the beasts of the field. . . . It is principally on account of our reason, that we are said to have been *created in the image of God*."²⁹¹ However,

it necessarily follows from the supposition of our rational faculties being *limited*, that there is *room* for our being instructed by revelation. . . . It is the proper office of reason to determine whether what is proposed to us under the notion of revelation from God, be attended with suitable attestations and credentials, or not. So that even in this case, we may of *ourselves judge what is right*.²⁹²

Under either vision, the importance of rational inquiry (or the exercise of conscience) to religious belief, and the consequent need for its protection, were assumed.²⁹³ Indeed, freedom of conscience was of such importance that "[i]f this freedom be abused, it is an offense against God, not against man: To God, therefore, . . . must an account of it be rendered."²⁹⁴

Some who have addressed the role of religion in American

proper remedies lie in time, forbearance, and example . . ."); Letter from Thomas Jefferson to Edward Dowse (Apr. 19, 1803), in 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 176, at 376, 378 ("[W]e are bound . . . to make common cause, even with error itself, to maintain the common right of freedom of conscience."); THOMAS PAINE, THE AGE OF REASON, *quoted in* 1 STOKES, *supra* note 17, at 321 (" . . . I have always strenuously supported the right of every man to his opinion The most formidable weapon against errors of every kind is reason.").

291. Jonathan Mayhew, *Men, endowed with Faculties proper for discerning the Difference betwixt truth and Falsehood, etc.*, in MAYHEW, *supra* note 285, at 39.

292. *Id.* at 35-36.

293. The protection of religion through protection of freedom of conscience is perhaps most eloquently set out in the two great documents of the Virginia disestablishment struggle, Jefferson's *Bill for Establishing Religious Freedom* and Madison's *Memorial and Remonstrance*. See THOMAS JEFFERSON, BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1777) (original draft), in THE PORTABLE THOMAS JEFFERSON, *supra* note 207, at 251; JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 183.

294. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 186; see also Statement of Rev. Payson, Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Jan. 20, 1788), in 2 ELLIOT'S DEBATES, *supra* note 276, at 120 ("[A]ttempts to erect human tribunals for the consciences of men are impious encroachments upon the prerogatives of God.").

Revolutionary ideology have posed religion and religious ideas as oppositional to the broader, rationalistic ideas of the Enlightenment.²⁹⁵ An examination of the writings of this period, however, leads to a different conclusion: that rising confidence in the powers of human reason and associated empiricism simply was fused with emerging strains of religious thought. Although there was certainly resistance by some who feared the introduction of any rationalistic elements into revealed religion,²⁹⁶ any clear division of religious groups into rationalist or pietist is virtually impossible.²⁹⁷ Across the religious spectrum, reason and "more primordial" ways of knowing religious truth became deeply intertwined.²⁹⁸ Rational inquiry was not seen as incompatible with religious inspiration or the quest for religious truth; indeed, the former was seen as necessary for the latter.²⁹⁹ A Massachu-

295. Forrest McDonald cites the rise in popularity of the natural rights theories of John Locke as part of the ideological movement away from an assumed merger of church and state and religious impediments to intellectual freedom. He notes that the natural rights theories of Locke were repeatedly cited without reference to their religious source—such source being inimical (in his view) to rising rationalistic and individualistic movements. MCDONALD, *supra* note 202, at 7, 57-70.

Henry F. May similarly asserts that the alliance of the Enlightenment and evangelical Protestantism was illusory because "the doctrine of salvation by unmerited grace that was defined by many as the consistent center of Protestantism was . . . the very opposite of enlightened morality." In his view, "Protestantism and the Enlightenment were allies only when they faced common enemies." MAY, *supra* note 13, at 117-18. As May acknowledges, however, doctrines of salvation were only a small part of the comprehensive world view offered by evangelical Protestantism; many other tenets of these religious groups were perfectly compatible with Enlightenment ideas. *Id.*

296. See, e.g., CURRY, *supra* note 202, at 99; KOCH, *supra* note 258, at 239-84 (discussing resistance of some established religious groups to eighteenth-century rationalistic trends).

297. See, e.g., BLOCH, *supra* note 18, at 103-04 (discussing the convergence of dissenting religious thought and radical Whig ideology); ADRIENNE KOCH, POWER, MORALS, AND THE FOUNDING FATHERS: ESSAYS IN THE INTERPRETATION OF THE AMERICAN ENLIGHTENMENT 14 (1961) (noting that for evangelists, Newton and Locke provided ideas that fortified doctrines of predestination and original sin).

298. JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 60-63 (1985); see also KOCH, *supra* note 258, at 215 (discussing eighteenth-century Unitarian view that revelation worked together with reason in discovering the will of God).

299. See DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 28 (1989) [hereinafter FOUNDATIONS] (observing that the core belief of the right to freedom of conscience "was that persons are independent originators of reasonable claims on one another as ethical beings, and that the demands of ethics and of an ethical

setts clergyman pronounced that "[t]he learned Languages, Rhetoric, Logic, History, Philosophy, etc., are excellent Hand-maids to Divinity."³⁰⁰ They "who are Enemies to Learning are *so far*, whether they know it or not, Enemies to Religion . . ."³⁰¹ For Richard Price, Joseph Priestly, Benjamin Rush, and others, "[t]he unfolding of scientific truth seemed . . . perfectly consonant with biblical revelation."³⁰² Throughout the seventeenth and eighteenth centuries, "the guardians and interpreters of belief in God . . . had to come to terms with a radically changing social and intellectual environment."³⁰³ The result was not an abandonment of religious beliefs, but an adaptation of religion to the new intellectual style.³⁰⁴ Along with the secular Enlighten-

God could only be both known and practically effective . . . when persons' right to conscience was appropriately respected"); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 8 (1969) (noting that scriptural truth was believed to be supported by experience and reason; few American ministers saw any need to deny the Enlightenment for the sake of religion).

300. JAMES FINLEY, *AN ESSAY ON THE GOSPEL MINISTRY* 46 (1763).

301. ANDREW CROSWELL, *A TESTIMONY AGAINST THE PROFANENESS OF SOME OF THE PUBLIC DISPUTES, ON THE LAST COMMENCEMENT DAY; WITH LETTERS TO THE REV'D PRESIDENT OF HARVARD COLLEGE, ON THE OCCASION: HIS LETTER OF DEFENCE, AND REMARKS UPON IT* 16 (1760).

302. BLOCH, *supra* note 18, at 103-04; *see also* RICHARDS, *FOUNDATIONS*, *supra* note 299, at 24-25 (arguing that the American Founders saw enlightenment in law, history, religion, and philosophy as one process).

303. TURNER, *supra* note 298, at 22.

304. *Id.* at 22-23. Such changes included increased lay involvement in religious devotions and greater emphasis on individual acceptance of religious creeds. *Id.*; *see also* MAY, *supra* note 13, at 113, 120 (noting Enlightenment ideas that "it had recently become possible, through the proper use of the human faculties, to understand the Universe better than it had ever been understood before, and to make practical use of this understanding," were not necessarily inconsistent with beliefs that the universe "remained finally mysterious, understandable only through divine illumination . . ."); CONRAD WRIGHT, *THE BEGINNINGS OF UNITARIANISM IN AMERICA* (1954) (discussing the rise of religious groups who advocated rationalist and faith-based religious beliefs).

Carl Becker challenges the assumption that the thirteenth century was an "age of faith" and the eighteenth century an "age of reason." Although reason was used to discredit Christian dogma, eighteenth-century philosophers in fact (if not in form) retained many of the religious foundations and preconceptions of their forbearers:

They had put off the fear of God, but maintained a respectful attitude toward the Deity. They ridiculed the idea that the universe had been created in six days, but still believed it to be a beautifully articulated machine designed by the Supreme Being according to a rational plan as an abiding place for mankind. . . . They renounced the authority of

ment, there was a "Christian Enlightenment" as well.³⁰⁵ As Ruth Bloch has written, for many Protestant groups, reason and revelation were the "twin pillars of true religion."³⁰⁶

Prominent secular figures articulated similar ideas. The Virginia Declaration of Rights, drafted by George Mason and amended by Madison, declared that "[r]eligion, or the duty which we owe to our Creator," can "be directed only by reason and conviction, not by force or violence;" as a result, "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."³⁰⁷ Freedom of conscience—freedom in the use of human reason—was necessary if religious truth and the will of God were to be discovered. "Reason," Ethan Allen wrote, "must be the standard, by which we determine the respective claims of [religious] revelation . . ."³⁰⁸ John Adams referred to the "Liberty of conscience" as "the right of free inquiry and private judgment."³⁰⁹ Jefferson argued that religion in-

church and Bible, but exhibited a naive faith in the authority of nature and reason. . . . They dismantled heaven, somewhat prematurely it seems, since they retained their faith in the immortality of the soul. . . . They denied that miracles ever happened, but believed in the perfectibility of the human race.

CARL BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 30-31 (1932).

305. See MILLER, *supra* note 9, at 90 (discussing John Witherspoon, a dissenting clergyman whose views combined Calvinism and Scottish Enlightenment ideas).

306. BLOCH, *supra* note 18, at 194.

307. Virginia Declaration of Rights, § 16 (1776), in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 236 (1971). The original language, proposed by George Mason, read: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience" MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 21 (1978). James Madison proposed deletion of the reference to "toleration" and this version was finally adopted. *Id.*

308. ETHAN ALLEN, *REASON THE ONLY ORACLE OF MAN* 475 (1784).

309. Letter from John Adams to Thomas Jefferson (Jan. 23, 1825), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 281, at 607, 607-08. Adams repeatedly stressed the element of rational choice in the selection of religious beliefs and opinions. In his diary, he wrote that men should examine "with unbiased judgments every system of religion" and choose "one system, on their own authority, for themselves." John Adams, diary entry of Mar. 7, 1756, in 2 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS* 8 (Charles F. Adams ed., 1850) [hereinafter *THE WORKS OF JOHN ADAMS*]. To

volved "the assent of the mind to an intelligible proposition."³¹⁰ "We should . . . follow the oracle of conscience, and say nothing about what no man can understand, nor therefore believe . . ."³¹¹ "[O]ur reason at last must ultimately decide, as it is the only oracle which God has given us to determine between what really comes from Him and the phantasms of a disordered or deluded imagination."³¹² Jefferson wrote, "We should . . . moralise for ourselves, follow the oracle of conscience . . ."³¹³

The desire to separate religion and reason, and to paint them in starkly oppositional terms, is more a product of modern minds than of those of the eighteenth century.³¹⁴ Religion, as broadly

a colleague he wrote, "[God] has given me reason, to find out the truth and the real design of my existence here" Letter from John Adams to Richard Cranch (Oct. 18, 1756), in *"IN GOD WE TRUST"*, *supra* note 217, at 91, 92.

310. Letter from Thomas Jefferson to John Adams (Aug. 22, 1813), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 281, at 367, 368.

311. *Id.* In a letter to his nephew, Jefferson wrote, "Question with boldness even the existence of a God; because, if there be one, he must more approve of the homage of reason, than of blindfolded fear." Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 429, 431 (Adrienne Koch & William Peden eds., 1944).

312. Letter from Thomas Jefferson to Miles King (Sept. 26, 1814), in *14 THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 196, 197.

313. Letter from Thomas Jefferson to John Adams (Aug. 22, 1813), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 281, at 367, 368; *see also* SAMUEL DAVIS, ET AL., *MEMORIAL*, in *HOVEY*, *supra* note 271, at 204 (defining conscience as "the free exercise of private judgment").

Madison's views of the relationship between the exercise of reason and the process of religious conviction are described in the report he wrote opposing the Alien and Sedition Acts of 1798. The precedent established by the violation of freedom of the press, he argued, may be equally fatal to the free exercise of religion:

By subjecting the truth of opinion to the regulation, fine, and imprisonment, to be inflicted by those who are of a different opinion, the free range of the human mind is injuriously restrained. The sacred obligations of religion flow from the due exercise of opinion, in the solemn discharge of which man is accountable to his God alone; yet, under this precedent the truth of religion itself may be ascertained, and its pretended licentiousness punished by a jury of a different creed This law, then, commits the double sacrilege of arresting reason in her progress towards perfection, and of placing in a state of danger the free exercise of religious opinions.

JAMES MADISON, *ADDRESS OF THE GENERAL ASSEMBLY TO THE PEOPLE OF THE COMMONWEALTH OF VIRGINIA* (1799), *reprinted in* *6 THE WRITINGS OF JAMES MADISON*, *supra* note 265, at 332, 337.

314. The tendency in much twentieth-century writing to define religion as involving

understood in this era, meant the acknowledgement or search for the transcendent in natural or human affairs. The human capacity to reason was seen as a way to understand the natural order and the laws by which it was governed. Religious groups differed in their identifications of the point at which they believed that reason failed and faith began; but virtually all acknowledged the critical role of individual reason in the formation of religious belief. While French philosophic skepticism and

belief in superstition and revelation (in opposition to reason) necessarily makes contrary beliefs—or mixtures of beliefs—"secular" or "nonreligious" in nature. *See, e.g.,* LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT*, at xi (1986) (asking whether the First Amendment was "the product of the 'secular humanists' of their time—rationalists, Unitarians, and Deists, like Benjamin Franklin and Thomas Jefferson—or [whether] its supporters [were] evangelical Christians seeking to protect religion from government"). The notion that Deism, for instance, was not religious in nature would have come as quite a surprise to its founder, who saw it as "an expression of religious concern—of impatience particularly with the divisions and contentions of . . . Christianity." HEIMERT, *supra* note 258, at 539. Among the fundamental principles of the Deistic Society of the State of New York were:

That the universe proclaims the existence of one supreme Deity, worthy [of] the adoration of intelligent beings.

That a religion mingled with persecution and malice cannot be of divine origin.

That education and science are essential to the happiness of man.

That civil and religious liberty [are] equally essential to his true interests.

That there can be no human authority to which man ought to be amenable for his religious opinions.

ELIHU PALMER, *POSTHUMOUS PIECES 10-11*, reprinted in 1 STOKES, *supra* note 17, at 266.

Perhaps ironically, it is those associated with the twentieth century's political and religious right who have most readily acknowledged the intertwined nature of religious and American Enlightenment ideas. *See, e.g.,* ROCKNE MCCARTHY, ET AL., *DISESTABLISHMENT A SECOND TIME: GENUINE PLURALISM FOR THE AMERICAN SCHOOLS* 27 (1982). By successfully establishing the religious nature of American Enlightenment thought, such commentators can (they believe) demonstrate its unconstitutional establishment in the public schools of this country. Whatever the merits of this conclusion, it is clear that denial of the integrated nature of religious ideas and the American Enlightenment has facilitated the attempted separation of the religious and the secular in American law and politics. Whether the result of a conscious strategy of Enlightenment thinkers, *see id.* at 28, 50, a sincere belief in the absence of religious elements and roots, or sheer coincidence, the pervasive belief in later times of the incompatibility of religion and reason has facilitated belief in the separability of the religious and the secular in individual lives, in the broader cultural milieu, and in government.

other expressions of Enlightenment rationalism weakened some orthodox and evangelistic religious movements, they strengthened others, particularly those that stressed individual conscience, individual responsibility, and an individual's direct relationship with God.³¹⁵ The ascendancy of rational inquiry led, itself, to calls for freedom of conscience. "[T]he gradual improvement of the human mind that has . . . taken place, has been leading these colonies into that truly righteous and Catholic principle, Universal Toleration and Liberty of Conscience . . ."³¹⁶

Freedom of conscience was believed to hold great importance for the state, as well. In the Founding Era, "moral law" was seen as something firmly rooted in religious ideas, truths, imperatives, and fears. The laws that were believed to govern human conduct were stated to be "dictated by God himself"³¹⁷ or "given by the Sovereign of the universe to all mankind."³¹⁸ In the common view, "if there [were] no God there could be no moral obligations."³¹⁹ Richard Henry Lee of Virginia wrote that

315. See 1 STOKES, *supra* note 17, at 265-66.

316. SAMUEL WILLIAMS, A DISCOURSE ON THE LOVE OF OUR COUNTRY 15 (1775).

317. In an early essay, Alexander Hamilton describes the "law of nature," quoting Blackstone: "This is what is called the law of nature, 'which, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other.'" ALEXANDER HAMILTON, THE FARMER REFUTED, *reprinted in* 1 THE WORKS OF ALEXANDER HAMILTON 55, 62 (Henry C. Lodge ed., 1904); see also JOHN P. REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 25 (1988) (discussing the eighteenth-century association between revelation and natural law).

318. Letter from John Jay to John Murray (Apr. 15, 1818), *in* 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 403, 403 (Henry P. Johnston ed., 1893). In The Federalist No. 43, Madison referred to "the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed." THE FEDERALIST NO. 43 (James Madison), *reprinted in* 11 THE WORKS OF ALEXANDER HAMILTON, *supra* note 317, at 354, 365.

319. Letter from John Jay to John Bristed (Apr. 23, 1811), *in* 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 318, at 358, 359-60. Jay reported this remark as part of his conversation with an English physician, who was a professed atheist. The physician

did not hesitate to admit that, if there [were] no God, there could be no moral obligations, but insisted that they were not necessary, . . . that society would find a substitute for them in enlightened self-interest. I soon turned the conversation to another topic, and he, probably perceiving that his sentiments met with a cold reception, did not afterwards resume the subject.

Id. at 360; see KERBER, *supra* note 18, at 210 n.85 (discussing the intimate connec-

"[r]efiners may weave as fine a web of reason as they please, but the experience of all times shows Religion to be the guardian of morals" ³²⁰ James Madison, often identified as a secularist, maintained in private correspondence that "the belief in a God All Powerful wise and good, is so essential to the moral order of the World and to the happiness of man, that arguments which enforce it cannot be drawn from too many sources nor adapted with too much solicitude" ³²¹

The importance of religiously-based, transcendent principles to fundamental moral ideas was the theme of a critique of contemporary French philosophers written by John Adams in 1816. Adams, a child of the Enlightenment who prized the fruits of reason and derided religious superstition, lashed out at what he believed to be an attempt by French philosophers to separate religion and moral truth:

And what was their Phylosophy? Atheism; pure unadulterated Atheism. . . . The Univer[s]e was Matter only and eternal; Spirit was a Word Without a meaning; Liberty was a Word Without a Meaning. There was no Liberty in the Universe; Liberty was a Word void of Sense. Every thought Word Passion Sentiment Feeling, all Motion and Action was necessary. All Beings and Attributes were of eternal Necessity. Conscience, Morality, were all nothing but Fate. ³²²

Conscience was believed to afford human beings access to this "law of God," or "moral law." ³²³ Man was endowed by God

tion between religious belief and natural rights expounded by the clergy in this era).

320. Letter from Richard H. Lee to James Madison (Nov. 26, 1784), in 8 THE PAPERS OF JAMES MADISON, *supra* note 210, at 149, 149; see FISHER AMES, PHOCION NO. IV (Apr., 1801), reprinted in 2 WORKS OF FISHER AMES, *supra* note 282, at 162, 164.

321. Letter from James Madison to Rev. Frederick Beasley (Nov. 20, 1825), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 503, 503-04 (1867).

322. Letter from John Adams to Thomas Jefferson (Mar. 2, 1816), in THE ADAMS-JEFFERSON LETTERS, *supra* note 281, at 464, 464-65. Adams' interweaving of religious and Enlightenment ideas is also evident in another letter:

Phylosophy which is the result of Reason, is the first, the original Revelation of the Creator to his Creature, Man. When this Revelation is clear and certain, by Intuition or necessary Induction, no subsequent Revelation supported by Prophecies or Miracles can supercede it.

Letter from John Adams to Thomas Jefferson (Dec. 25, 1813), in THE ADAMS-JEFFERSON LETTERS, *supra* note 281, at 409, 412.

323. See JAMES WILSON, OF THE GENERAL PRINCIPLES OF LAW AND OBLIGATION, re-

"with rational faculties, by the help of which to discern and pursue such things as were consistent with his duty and interest."³²⁴ The complimentary roles of reason and revelation in the apprehension of moral principles was expressed by Ethan Allen in his famous pamphlet, *Reason the Only Oracle of Man*:

[M]orality does not derive its nature from books, but from the fitness of things The knowledge of this as well as all other sciences, is acquired from reason and experience, and (as it is progressively obtained) may with propriety be called, the revelation of God, which he has revealed to us in the constitution of our rational natures³²⁵

During the Massachusetts ratifying convention, conscience was described as "the reason God has given us, employed on our moral actions, in their most important consequences."³²⁶ The relationship of conscience to free inquiry, universal moral principles, and individual responsibility was expounded by Adams. In a private letter, he wrote:

Morals are no qualities of matter; nor, as far as we know, of

printed in SELECTED POLITICAL ESSAYS OF JAMES WILSON 224, 255-56 (Randolph G. Adams ed., 1930).

324. ALEXANDER HAMILTON, THE FARMER REFUTED (1775), reprinted in 1 THE WORKS OF ALEXANDER HAMILTON, *supra* note 317, at 55, 63.

325. ALLEN, *supra* note 308, at 466.

The roots of these beliefs can be traced to John Locke, among others. Carl Becker writes of Locke's contribution to this intellectual movement in the following terms:

Locke, more perhaps than anyone else, made it possible for the eighteenth century to believe . . . [that] it was possible for men "to correspond with the general harmony of Nature"; that since man, and the mind of man, were integral parts of the work of God, it was possible for man, by the use of his mind, to bring his thought and conduct . . . into a perfect harmony with the Universal Natural Order. In the eighteenth century . . . these truths were widely accepted as self-evident: that a valid morality would be a "natural morality," a valid religion would be a "natural religion," a valid law of politics would be a "natural law." This was only another way of saying that morality, religion, and politics ought to conform to God's will as revealed in the essential nature of man.

CARL L. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 57 (1922).

326. Statement of Rev. Payson, Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Jan. 30, 1788), in 2 ELLIOT'S DEBATES, *supra* note 276, at 120.

simple spirit or simple intelligence. Morals are attributes of spirits *only* when those spirits are *free* as well as intelligent agents, and have consciences or a moral sense, a faculty of discrimination not only between right and wrong, but between good and evil, happiness and misery, pleasure and pain. This freedom of choice and action, united with conscience, necessarily implies a responsibility to a lawgiver and to a law, and has a necessary relation to right and wrong, to happiness and misery.³²⁷

...
 . . . A faculty or a quality of distinguishing between moral good and evil, as well as physical happiness and misery, that is, pleasure and pain, or in other words, a CONSCIENCE . . . is essential to morality.³²⁸

The content of the moral principles to be apprehended by conscience was often described in sweeping terms: a "passion for liberty and justice, for truth and humanity."³²⁹ Although always stressing liberty of thought, the articulate spokesmen of this era nonetheless believed that certain fundamental principles could—indeed must—be apprehended by men. "The practice of morality being necessary for the well-being of society, . . . [God] has taken care to impress its precepts so indelibly on our hearts that they shall not be effaced by the subtleties of our brain."³³⁰ Throughout this era, as in European Enlightenment writings before, Americans spoke and wrote of equality, liberty, integrity, and justice, as assumed values in a known world.³³¹ Jefferson stated that the Declaration of Independence "place[d] before mankind the common sense of the subject" and rested

327. Letters from John Adams to John Taylor (1814), in 6 THE WORKS OF JOHN ADAMS, *supra* note 309, at 447, 450.

328. *Id.* at 520.

329. BECKER, *supra* note 325, at 43.

330. Letter from Thomas Jefferson to James Fishback (Sept. 27, 1809), in 12 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 176, at 314, 315.

331. See, e.g., MARVIN MEYERS, THE MIND OF THE FOUNDER, at xxiii (1973) (claiming that in Madison's view, equality was the foundational concept of republican government); Wilson C. McWilliams, *On Equality as the Moral Foundation for Community*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC (Robert H. Horwitz ed., 1986). To American patriots, "[t]he value of the American Revolution lay . . . in what it promised to the human race": "advancing the cause of freedom and righteousness across the earth." BLOCH, *supra* note 18, at 85-86.

upon "the harmonizing sentiments of the day."³³² Individuals might differ in their ability to apprehend these values, or in their willingness to set other, purely self-interested goals aside; but the reason for conflict or deviation was not a question of the existence of such principles themselves.

Jefferson wrote at length about these questions, and his answers are particularly illuminating of the assumptions of many of the articulate spokesmen of his age. In a private letter he wrote that man "was endowed with a sense of right and wrong This sense is as much a part of his nature, as the sense of hearing, seeing, feeling; it is the true foundation of morality"³³³ Fundamental moral truths, he wrote, could be found in "those moral precepts . . . in which all religions agree, (for all forbid us to murder, steal, plunder, or bear false witness)"; these must be distinguished from "dogmas in which all religions differ, and which are totally unconnected with morality."³³⁴ Basic moral precepts included, in Jefferson's view,

332. Letter Thomas Jefferson to Henry Lee (May 8, 1825), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON*, *supra* note 311, at 719, 719; see also JAMES H. RUTHERFORD, *THE MORAL FOUNDATIONS OF UNITED STATES CONSTITUTIONAL DEMOCRACY* 2 (1992).

333. Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON*, *supra* note 311, at 430. Jefferson's beliefs were echoed by many others in this era. Jonathan Mayhew wrote, "men are naturally endowed with faculties proper for distinguishing betwixt truth and error, right and wrong. And hence it follows, that the doctrine of total ignorance, and incapacity to judge of moral and religious truths . . . is without foundation." Mayhew, *Men, Endowed with Faculties Proper for Discerning the Difference Betwixt Truth and Falsehood, etc.*, in MAYHEW, *supra* note 285, at 38. See generally RICHARDS, *FOUNDATIONS*, *supra* note 299, at 84 (characterizing the "moral sense" in this era as a post-Lockean construct used to ground inalienable human rights); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 106-10 (1986) [hereinafter *TOLERATION*] (discussing the concept of "moral sense" in eighteenth-century moral philosophy). Some have traced this concept to figures of the Scottish Enlightenment. See MOONEY, *supra* note 6, at 7 (tracing the roots of this concept to Scottish moral philosophers David Hume and Francis Hutcheson).

334. Letter from Thomas Jefferson to James Fishback (Sept. 27, 1809), in *12 THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 314, 315; see also Letter from Thomas Jefferson to Thomas Leiper (Jan. 21, 1809), in *12 THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 236, 236-37 ("As to myself, my religious reading has long been confined to the moral branch of religion, which is the same in all religions").

Thomas Paine expressed a similar confidence in the existence of fundamental moral similitude among the world's peoples. "All religions are in their nature kind

"acting honestly towards all, benevolently to those who fall with-in our way, respecting sacredly their rights, bodily and mental, and cherishing especially their freedom of conscience, as we value our own."³³⁵ Jefferson noted:

[H]e who steadily observes those moral precepts in which all religions concur, will never be questioned at the gates of heaven That on entering there, . . . the Aristides and Catos, the Penns and Tillotsons, Presbyterians and Baptists, will find themselves united in all principles which are in concert with the reason of the supreme mind.³³⁶

and benign, and united with principles of morality. They could not have made proselytes at first by professing anything that was vicious, cruel, persecuting, or immoral." THOMAS PAINE, *THE RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE'S ATTACK ON THE FRENCH REVOLUTION* 67 (Arthur Seldon, ed., 1938). Religions became corrupt and persecutory when merged with the state: "The Inquisition in Spain does not proceed from the religion originally professed, but [from the merger] . . . between the Church and the State. . . . Persecution is not an original feature in *any* religion; but it is always the strongly-marked feature of all law-religions, or religions established by law." *Id.* at 67-68; see also ALLEN, *supra* note 308, at 468-69 ("A conformity to moral rectitude, which is morality in the abstract, is the sum of all religion, that ever was or can be in the universe; as there can be no religion in that in which there is no moral obligation; except we make a religion to be void of Reason").

335. Letter from Thomas Jefferson to Miles King (Sept. 26, 1814), in 14 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 196, 197-98.

336. Letter from Thomas Jefferson to William Canby (Sept. 18, 1813), in 13 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 376, 377.

Jefferson acknowledged that this moral instinct or moral sense seemed to be defective in some: "[i]t is given to all human beings in a stronger or weaker degree, as force of members is given them in a greater or less degree." Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), in *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 256, 257. However, "it is false reasoning which converts exceptions to the general rule." It is, "like the want or imperfection of the senses of sight and hearing . . . , no proof that it is a general characteristic of the species." When such deficiency is found, "we endeavor to supply the defect by education, by appeals to reason and calculation, by presenting to the being so unhappily conformed, other motives to do good and eschew evil" Letter from Thomas Jefferson to Thomas Law (June 13, 1814), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON*, *supra* note 311, at 636, 639.

Jefferson also addressed the question of whether these moral precepts were culturally or otherwise contextually bound:

Some have argued against the existence of a moral sense by saying that if nature had given us such a sense, impelling us to virtuous actions, and warning us against those which are vicious, then nature would have also designated, by some particular earmarks, the two sets of actions which are, in themselves, the one virtuous and the other vicious.

The concept that was used during the Founding Era to describe the relationship between abstract moral principles (apprehended by conscience) and individual or collective action was that of "public virtue": the sacrifice of individual interests to the interests of the societal whole. Public virtue meant "a disinterested attachment to the public good, exclusive and independent of all private and selfish interest."³³⁷ Public virtue, and the moral principles of which it was composed, were believed to create the positive cohesion necessary for the maintenance of basic social institutions.³³⁸ Although contrary opinions exist-

Letter from Thomas Jefferson to John Adams (Oct. 14, 1816), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 281, at 490, 492. Instead, "we find, in fact, that the same actions are deemed virtuous in one country and vicious in another." *Id.* The answer, he wrote, lies in the concept of utility. "Men living in different countries, under different circumstances, different habits and regimens, may have different utilities; the same act, therefore, may be useful, and consequently virtuous in one country which is injurious and vicious in another differently circumstanced." *Id.* "[Justice] is instinct, and innate . . . ; for virtue does not consist in the act we do, but in the end it is to effect. If it is to effect the happiness of him to whom it is directed, it is virtuous . . ." *Id.*

337. CARTER BRAXTON, A NATIVE OF THIS COLONY, VA. GAZETTE, June 8, 1776, reprinted in 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805*, at 328, 334 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

This was the most common understanding of the concept of virtue. Any concept with such widespread currency was, of course, used in different ways with different meanings. As Ruth Bloch has written:

"[V]irtue" in American political discourse contained many different shades of meaning throughout the revolutionary period, drawing at once upon secular republican theory and Protestant ideas about righteousness. . . . The personal virtues of industry and frugality [were] deemed essential to a good citizen The belief that the individual should sacrifice for the common good was also integral to ideas . . . of . . . community.

BLOCH, *supra* note 18, at 109 (footnote omitted).

Lance Banning has argued that public virtue in the civic republican tradition consisted not in the abnegation of self-interest, but in the "vigorous and vigilant defense of one's own liberties and interests" within the context of submission to the will of the community, as expressed through republican government. Lance Banning, *Some Second Thoughts on Virtue and the Course of Revolutionary Thinking*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 199-200 (Terrence Ball & John G.A. Pocock eds., 1988). I am not sure that this difference is material. The essence of the matter is whether individual interests must yield, as an ultimate matter, to the needs of the community. This is true under either formulation.

338. See, e.g., Letter from John Adams to Benjamin Rush (Aug. 28, 1811), in 9 *THE WORKS OF JOHN ADAMS*, *supra* note 309, at 635, 636 ("I agree with you in sentiment, that religion and virtue are the only foundations, not only of republican-

ed,³³⁹ references to public virtue as part of the necessary foundation for republican government are found throughout the writings of this period. New England Federalists such as John Adams, Fisher Ames, and Rufus King wrote compellingly of the need for a virtuous citizenry.³⁴⁰ Those from other geographical and political points of view expressed similar beliefs.³⁴¹ During

ism and of all free government, but of social felicity . . . and in all the combinations of human society.”).

339. See JOHN G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 534 (1975) (quoting William Webster: “[v]irtue, patriotism, or love of country, never was and never will be, till men’s natures are changed, a fixed, permanent principle and support of government”).

340. See, e.g., FISHER AMES, *LAOCOON. NO. II* (Apr., 1799), reprinted in 2 *WORKS OF FISHER AMES*, *supra* note 282, at 118, 126 (“[O]ur government has been, and is supported only by the appeal to virtue, zeal, and patriotism of the body of the citizens.”); JOHN ADAMS, *NOVANGLUS*, reprinted in 4 *THE WORKS OF JOHN ADAMS*, *supra* note 309, at 3, 31 (“[L]iberty can no more exist without virtue and independence than the body can live and move without a soul”). As Rufus King wrote:

I myself have been an advocate for a Government free as air; my opinions have been established upon the belief that my countrymen were virtuous, enlightened, and governed by a sense of Right and Wrong. . . . But if in opposition to these Sentiments the great Body of the people are without Virtue, and not governed by any internal Restraints of Conscience, there is but too much room to fear that the Framers of our constitutions and laws have proceeded on principles that do not exist . . .

Letter from Rufus King to Theodore Sedgwick (Oct. 22, 1786), quoted in ERNST, *supra* note 183, at 86; see also KERBER, *supra* note 18, at 201, 208-12 (discussing the linkage of morality, public virtue, and governmental stability in the Federalist mind).

At times, this emphasis on virtue took sectarian and xenophobic turns. Ames wrote that “[t]he first settlers of the British Northern colonies were Englishmen. . . . They were serious, devout Christians, of pure, exemplary morals Instead of building a Babel of wild Irish, Germans, and outlaws of all nations, . . . they excluded not only foreigners, but immoral persons, from political power” FISHER AMES, *PHOCION. NO. IV* (1801), reprinted in 2 *WORKS OF FISHER AMES*, *supra* note 282, at 162, 162-63. After the Federalist defeat in 1800, Ames despaired at the demise of this moral purity. Federalism, he wrote, was founded “on the supposed existence of sufficient political virtue, and on the permanency and authority of the public morals.” FISHER AMES, *THE DANGERS OF AMERICAN LIBERTY* (1805), reprinted in 2 *WORKS OF FISHER AMES*, *supra* note 282, at 344, 379. “We are sliding down into the mire of a democracy, which pollutes the morals of the citizens before it swallows up their liberties.” FISHER AMES, *For the Anthology*, *MONTHLY ANTHOLOGY AND BOSTON REVIEW*, (1805), quoted in BERNHARD, *supra* note 182, at 337.

341. Linda Kerber noted that “Americans of both parties were fond of the notion that virtue of the citizen and the stability of the republic were linked.” KERBER, *supra* note 18, at 201.

the Virginia ratification debate, John Marshall stated his agreement with Patrick Henry that there are "certain fundamental principles, from which a free people ought never to depart." These included "the favorite maxims of democracy": "[a] strict observance of justice and public faith, and a steady adherence to virtue."³⁴² In commenting on his failed *Bill for a More General Diffusion of Knowledge*, Jefferson wrote that it "would have raised the mass of the people to the high ground of moral responsibility necessary to their own safety, and to orderly government."³⁴³ State constitutions echoed similar sentiments.³⁴⁴ Indeed, an experiment in republican government was believed to depend more heavily on the existence of public virtue among its citizens than did other governmental systems.³⁴⁵

The belief in this era that religiously-based "virtue" was necessary for the success of the republican experiment has been the subject of extensive commentary.³⁴⁶ Federalists³⁴⁷ and

342. Statement of John Marshall, Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 10, 1788), in 3 ELLIOT'S DEBATES, *supra* note 276, at 223.

343. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in THE ADAMS-JEFFERSON LETTERS, *supra* note 281, at 387, 390.

344. See, e.g., MASS. CONST. of 1780, pt. II, ch. V, § II, in 3 THORPE, *supra* note 240, at 1888, 1907 ("Wisdom and knowledge, as well as virtue, diffused generally among the people, being necessary for the preservation of their rights and liberties . . ."); PA. CONST. of 1776, Plan or Frame of Government for the Commonwealth or State of Pennsylvania, § 45, in 5 THORPE, *supra* note 240, at 3081, 3091 ("Laws for the encouragement of virtue, and the prevention of vice and immorality, shall be made and constantly kept in force . . .").

345. See THE FEDERALIST NO. 55, at 341, 346 (James Madison) (Clinton Rossiter ed., 1961).

346. See, e.g., KERBER, *supra* note 18, at 208-12; MILLER, *supra* note 9, at 28-29 (discussing the prevalent belief that religion was a necessary foundation for public virtue and, consequently, for a free republic); Gerard V. Bradley, *Imagining the Past and Remembering the Future: The Supreme Court's History of the Establishment Clause*, 18 CONN. L. REV. 827, 834 (1986) (observing that religion lay "at the heart of . . . a virtuous citizenry," providing critical support for the "virtuous habits and traits . . . essential to self-government").

347. John Adams wrote that "[w]e have no government armed with power capable of contending with human passions unbridled with morality and religion. Our Constitution was made only for a moral and a religious people. It is wholly inadequate to the government of any other." JOHN ADAMS, REPLY TO THE MASSACHUSETTS MILITIA, quoted in JOHN R. HOWE, JR., THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS 185 (1966); see also Letter from John Adams to Abigail Adams (Nov. 5, 1775), quoted in 1 STOKES, *supra* note 17, at 512 ("Statesmen may plan and speculate for Lib-

others³⁴⁸ wrote compellingly of the religio-moral fabric believed necessary to sustain republican government. This pervasive belief was expressed in state constitutions³⁴⁹ and congressional

erty, but it is Religion and Morality alone which can establish the principles upon which Freedom can securely stand."); Letter from John Adams to Benjamin Rush (Aug. 28, 1811), in 9 THE WORKS OF JOHN ADAMS, *supra* note 309, at 635, 636 ("I agree with you in sentiment, that religion and virtue are the only foundations not only of republicanism and of all free government, but of social felicity under all governments and in all the combinations of human society.").

Other Federalists agreed. See Fisher Ames, Eulogy on Washington (Feb. 8, 1800), in 2 WORKS OF FISHER AMES, *supra* note 282, at 71, 82 ("Our liberty . . . is founded on morals and religion, whose authority reigns in the heart . . ."); Alexander Hamilton, Washington's Farewell Address (Aug., 1796), in 8 WORKS OF ALEXANDER HAMILTON, *supra* note 317, at 187, 205 ("In all those dispositions which promote political happiness, religion and morality are essential props. In vain does he claim the praise of patriotism, who labors to subvert . . . these great pillars of human happiness, these firmest foundations of the duties of men and citizens.").

348. See, e.g., Letter from Patrick Henry to Archibald Blair (Jan. 8, 1799), *quoted in* KERBER, *supra* note 18, at 210 ("The great pillars of all government . . . [are] virtue, morality, and religion."); Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in THE ADAMS-JEFFERSON LETTERS, *supra* note 281, at 387, 390 ("Moral respectability [is] necessary to [the people's] own safety, and to orderly government . . .").

349. The Massachusetts Constitution of 1780 is representative:

As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of GOD, and of public instructions in piety, religion, and morality: Therefore, to promote their happiness, and to secure the good order and the preservation of their government, the people of this commonwealth . . . invest their legislature with the power to authorize and require . . . the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of GOD, and for the support and maintenance of public Protestant teachers of piety, religion, and morality

MASS. CONST. of 1780, pt. I, art. III, in 3 THORPE, *supra* note 240, at 1888, 1889-90.

Public virtue was often envisioned in oppressively narrow terms. This opinion is apparent in a proclamation issued by the Massachusetts Legislature shortly before independence:

That piety and virtue, which, alone, can secure the freedom of any people, may be encouraged, and vice and immorality suppressed, . . . [that] the good people of this Colony, . . . avoiding all blasphemies, contempt of the holy Scriptures, and of the Lord's day, and all other crimes and misdemeanors, all debauchery, profaneness, corruption, venality, all riotous and tumultuous proceedings, and all immoralities

Proclamation by the Massachusetts Legislature (Jan. 19, 1776), *reprinted in* 4 AMERICAN ARCHIVES 833-35 (Peter Force ed., 1843).

acts,³⁵⁰ and it became the rallying cry in the 1780s for those who believed that the stability of the republic was threatened by the decline of religiously-based moral principles and resulting corruption.³⁵¹ Only conscience, rooted in transcendent moral or religious values and imposing a sense of responsibility upon freely reasoning men, could provide the restraint on human conduct necessary for the survival of government by the people.³⁵²

Several commentators have questioned the role that the Framers ascribed to public virtue, in view of other evidence that they saw human nature as fundamentally depraved. It has been

350. See Rufus King, Northwest Ordinance of 1787 (art. III), *quoted in* 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING, COMPRISING HIS LETTERS, PRIVATE AND OFFICIAL, HIS PUBLIC DOCUMENTS AND HIS SPEECHES 287 (Charles R. King ed., 1894) [hereinafter THE LIFE AND CORRESPONDENCE OF RUFUS KING] (observing that "[r]eligion, morality and knowledge" are "necessary to good government").

351. See BLOCH, *supra* note 18, at 109; NELSON, *supra* note 252, at 104; WOOD, *supra* note 299, at 417; see also KERBER, *supra* note 18, at 206 (describing the press and the pulpit as preferred ways to reinforce a sense of public virtue in the populace during the 1780s).

For examples of this sentiment in period writing, see JOSEPH HUNTINGTON, A DISCOURSE, ADAPTED TO THE PRESENT DAY (1781); SAMUEL MAGAW, A SERMON DELIVERED IN ST. PAUL'S CHURCH ON THE 4TH OF JULY, 1786 (1786).

352. The reason for the compelling force of conscience or religiously-based moral precepts was often expressed as the fear of divine retribution which they inspired. Jefferson wrote that the "only firm basis" for "the liberties of a nation" is the "conviction in the minds of the people that these liberties are the gift of God," and "[t]hat they are not to be violated but with his wrath." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, *reprinted in* THE PORTABLE THOMAS JEFFERSON, *supra* note 207, at 23, 215.

The belief in the need for a divine system of rewards and punishments found particular expression in the religious requirements for public office and religious oaths required in courts of law. Rufus King expressed a common sentiment of the time:

Our laws constantly refer to this revelation, and by the oath which they prescribe, we appeal to the Supreme Being, so to deal with us hereafter, as we observe the obligation of our oaths.

The Pagan world were, and are, without the mighty influence of this principle . . . their morals were destitute of its powerful sanction . . .

Rufus King, Speech at the New York State Constitutional Convention (1821), *quoted in* ERNST, *supra* note 183, at 381. These requirements usually took decidedly, and oppressively, sectarian forms. See *infra* notes 407-18 and accompanying text.

The role of freedom of conscience in the development of ideas of individual responsibility and republican government is explored in RICHARDS, FOUNDATIONS, *supra* note 299, at 29-31.

argued that in the 1780s, the concept of virtue as an instrumental value in American political thought was abandoned and interest-group politics took its place. Gordon Wood, for instance, argued that a conclusion was reached that "[t]he American people apparently did not possess and were unwilling to acquire the moral and social character necessary to sustain republican governments."³⁵³ "Believing . . . that virtue had 'in a great degree taken its departure from our land' and was not to be easily restored, the Federalists hoped to create an entirely new and original sort of republican government—a republic which did not require a virtuous people for its sustenance."³⁵⁴

There is certainly abundant evidence that few of the leaders of the Founding Era failed to recognize that individuals often act out of self-interest and sacrifice to that self-interest other considerations of the public good.³⁵⁵ Recognition of the role of self-interest in human affairs did not, however, compel a conclusion that broader concepts of private and public good have no power. For instance, although Hamilton recognized that human beings often act out of self-interest,³⁵⁶ he also recognized that they

353. WOOD, *supra* note 299, at 415 (footnote omitted); see also *id.* at 610-12.

354. *Id.* at 475. Others have questioned this thesis. See, e.g., POCOCK, *supra* note 339, at 525-27 (arguing that "the theses and antitheses of virtue and corruption continued to be of great importance in shaping American thought"); McDONALD, *supra* note 202, at 189-91 (arguing that "[i]t is a grave mistake . . . to assume . . . that the Framers . . . cynically abandoned the whole notion of virtue . . . and opted to substitute crass self-interest in its stead").

355. Ames was particularly cynical about human nature, stating bluntly, "[o]ur mistake is in supposing men better than they are. They are bad, and will act their bad character out." Letter from Fisher Ames to Richard Peters (Dec. 14, 1806), in 1 WORKS OF FISHER AMES, *supra* note 282, at 377, 378. His view appeared to stem in part from the defeat of the Federalist party in the election of 1800. Reflecting upon his party's subsequent disintegration, Ames wrote:

Federalism was . . . manifestly founded on a mistake, on the supposed existence of sufficient political virtue, and on the permanency and authority of the public morals.

[Those] now in power committed no such mistake. They acted on the knowledge of what men actually are, not what they ought to be. . . . They knew that the vicious, on whom society makes war, would join them in their attack upon government. They inflamed the ignorant; they flattered the vain; they offered novelty to the restless; and promised plunder to the base.

FISHER AMES, THE DANGERS OF AMERICAN LIBERTY, reprinted in 2 WORKS OF FISHER AMES, *supra* note 282, at 344, 379.

356. Hamilton wrote,

sometimes do not;³⁵⁷ and that both good and bad impulses must be taken into account in establishing a republican government. In the *Federalist* No. 76, he wrote:

The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence. And experience justifies the theory.³⁵⁸

Moreover, the idea that *some* recognition of the common good was a precondition for republican government was assumed. Governmental structures—no matter how well crafted—could never, alone, contain the effects of concerted human depravity. This truth was acknowledged by Madison during the Virginia ratifying convention:

... I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there is not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.³⁵⁹

[H]ow little reason there is to expect that the persons intrusted with the administration of the affairs of the particular members of the confederacy will at all times be ready with perfect good humor and an unbiased regard to the public weal to execute the resolutions or decrees of the general authority. The reverse of this results from the constitution of man.

THE *FEDERALIST* NO. 15, at 105, 111 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton discussed the method for selecting federal judges: "[A]nd making the proper deductions for the ordinary depravity of human nature, the number [of qualified individuals] must be still smaller of those who unite the requisite integrity with the requisite knowledge." THE *FEDERALIST* NO. 78, at 464, 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

357. See ALEXANDER HAMILTON, *THE FARMER REFUTED* (1775), reprinted in 1 THE WORKS OF ALEXANDER HAMILTON, *supra* note 317, at 55, 73 (The "political maxim, that 'every man must be supposed to be a knave' is 'false in fact.'").

358. THE *FEDERALIST* NO. 76, at 454, 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

359. Statement of James Madison, Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 20, 1788), in 3 ELLIOT'S DEBATES, *supra* note 276, at 536-37.

In a newspaper article written in 1792, Madison suggested that "[t]he best distribution is that which would most favor *health, virtue, intelligence, and competency* in the *greatest number* of citizens. It is needless to add to these objects, *liberty* and safety. The first is presupposed by them. The last must result from them."³⁶⁰

Ideas about the relationship between individual virtue and republican self-government underwent substantial change and development in this period. The American republic was "born in turbulence";³⁶¹ eighteenth-century America was a society "in which violence was endemic."³⁶² "[T]hat their nation had been created by rebellion and secession was never far from the [Framers'] mind[s]."³⁶³ The establishment and maintenance of a stable, governmental system under conditions of human passions, factions, and material inequality³⁶⁴ required a

360. James Madison, *Republican Distribution of Citizens*, THE NAT'L GAZETTE, Mar. 5, 1792, reprinted in 6 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 96, 96. In THE FEDERALIST NO. 55, Madison wrote:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us, faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government

THE FEDERALIST NO. 55, at 341, 346 (James Madison) (Clinton Rossiter ed., 1961).

361. KERBER, *supra* note 18, at 181.

362. *Id.*

363. *Id.*

364. "Passions," "enthusiasms," and "selfish interests" were the human characteristics viewed as potentially detrimental to the maintenance of governmental order; their expression was in the form of "factions" bent upon self-interested aims at the expense of the whole. See Statement of Alexander Hamilton, as recorded in the Notes of the Secret Debates of the Federal Convention of 1787, Taken by Hon. Robert Yates (June 22, 1787), in 1 ELLIOT'S DEBATES, *supra* note 276, at 439 ("Take mankind as they are, and what are they governed by? Their passions Our prevailing passions are ambition and interest"). Fisher Ames provided memorable descriptions of these dangers. See Fisher Ames, Speech in the Convention of Massachusetts, on Biennial Elections (Jan., 1788), in 2 WORKS OF FISHER AMES, *supra* note 282, at 3, 7 ("Faction and enthusiasm are the instruments by which popular governments are destroyed. . . . [The people] nourish factions in their bosoms A democracy is a volcano, which conceals the fiery materials of its own destruction."); FISHER AMES, LAOCOON NO. II (1799), reprinted in 2 THE WORKS OF

multivaried approach. Madison and others recognized, with particular genius, that competing interests could serve as a source of governmental stability, and that one could control these interests through institutional design.³⁶⁵ The fact that such governmental structures were devised does not mean, however, that the drafters and ratifiers of those documents abandoned their belief in the value of transcendent moral norms to social and collective life. In *The Federalist* No. 51, Madison wrote that "[j]ustice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it

FISHER AMES, *supra* note 282, at 118, 126 ("A faction, whose union is perfect, whose spirit is desperate, addressing something persuasive to every prejudice, putting something combustible to every passion, granting some indulgence to every vice, promising those who dread the law to set them above it, to the mean whispering suspicion, to the ambitious offering power, to the rapacious, plunder, to the violent, revenge, to the envious, the abasement of all that is venerable . . . Behold this is our condition, these our terrors.").

365. Recognition of the need for institutional control through governmental structure and design is found throughout the writings of those most involved in the drafting of the Constitution. *See, e.g.,* THE FEDERALIST NO. 10, at 77, 81 (James Madison) (Clinton Rossiter ed., 1961). If the majority has

such coexistent passion or interest, [it] must be rendered, by [its] number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control.

Id. Ames argues:

It is in vain, it is indeed childish to say, that an enlightened people will understand their own affairs, and thus the acts of a faction will be baffled. No people on earth are or can be so enlightened as to the details of political affairs.

. . . .

Shall we be told, that if the nation is not animated with the public spirit, the individuals are at least fitted to be good citizens by the purity of their morals? But what are morals without restraints?

FISHER AMES, THE DANGERS OF AMERICAN LIBERTY, *reprinted in* 2 WORKS OF FISHER AMES, *supra* note 282, at 344, 364, 378; *see also* Fisher Ames, Speech in the Convention of Massachusetts, on Biennial Elections (Jan., 1788), *in* 2 THE WORKS OF FISHER AMES, *supra* note 282, at 3, 7 (remarking that biennial elections are necessary "as a security that the sober, second thought of the people shall be law"); Statement of Alexander Hamilton, as recorded in the Notes of the Secret Debates of the Federal Convention of 1787, Taken by Hon. Robert Yates (June 18, 1787), *in* 1 ELLIOT'S DEBATES, *supra* note 276, at 421-22 (discussing the need for lengthy terms in the national legislature to "check the imprudence of democracy").

be obtained"³⁶⁶ Belief in the existence of transcendent moral norms, and their necessary (although imperfect) recognition in social and governmental institutions, did not mean that these individuals simplistically believed that all individuals were virtuous or that virtue would, without more, overcome conflicting, self-seeking interests. Virtue was believed to be a real and vital force, even if (at times) it did not prevail; indeed, the struggle between good and evil was an integral part of the religious roots of the concept of virtue itself.

The coexistence of belief in the importance of freedom of conscience with the existence of governmental religious establishments presented an obvious paradox. The reconciliation of practically universal calls for freedom of conscience with religious intolerance and persecution was achieved by different groups in different ways. Some maintained that conscience could not lie and, therefore, the expression of beliefs which were religiously "erroneous" could not be a "true" exercise of conscience.³⁶⁷ Liberty of conscience for most New England Congregationalist clergy, for instance, was simply "liberty of what they regarded as conscience."³⁶⁸ Others simply assumed that the liberty of conscience of which they spoke presupposed the existence of a Protestant Christian state and the exclusion of religious competitors.³⁶⁹ Elisha Williams, Congregationalist minister and President of Yale University, wrote that although Lockean contractarian principles entitle each member of society to a natural and inalienable right to liberty of conscience, this does not include Catholics, who were enemies of a "Protestant State."³⁷⁰ Still others attempted to distinguish "civil" or "legal"

366. THE FEDERALIST NO. 51, at 320, 324 (James Madison) (Clinton Rossiter ed., 1961).

367. See CURRY, *supra* note 202, at 22.

368. *Id.* at 88. For example, religious freedom, as understood by the old line clergy, simply did not extend to the activities of evangelicals. See HEIMERT, *supra* note 258, at 205-06.

369. See *id.* at 78-79.

370. ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS (1744), *quoted in* CURRY, *supra* note 202, at 97-98; see also BENJAMIN GALE, A REPLY TO A PAMPHLET ENTITLED THE ANSWER OF THE FRIEND IN THE WEST, ETC., WITH A PREFATORY ADDRESS TO THE FREEMEN OF HIS MAJESTY'S ENGLISH COLONY OF CONNECTICUT (1755) (stating that freedom of conscience did not include those "whose religious Principles are not compatible with a Protestant Country, or destructive to

establishments, which imposed creeds, doctrinal standards, modes of worship, and other violations of conscience³⁷¹ from "non-violative" establishments of other kinds.³⁷²

The "momentum of the century," however, clearly lay with the dissenters.³⁷³ The hypocrisy of calls for freedom of conscience by those who (in the view of others) worked for its suppression became increasingly difficult to deny. The splintering of Protestantism into old line and evangelical sects accelerated dissent within the established ranks of those with political and economic power. Isaac Backus charged that the established Congregational Church in Massachusetts "has declared the Baptists to be irregular, therefore the secular power still *force* them to support the worship which they conscientiously dissent from."³⁷⁴ "[M]any who are filling the nation with the cry of LIBERTY and against *oppressors* are at the same time themselves violating that dearest of all rights, LIBERTY of CONSCIENCE."³⁷⁵ Tension between the principle of freedom of conscience and its denial found expression in the battlegrounds of two independent, but related, ideas: free exercise of religion and freedom from the establishment of religion by government.

the Community," such as Roman Catholics, Deists, and atheists).

371. See CURRY, *supra* note 202, at 117-33.

372. See *id.* at 117-33, 140-41, 178. Proponents in Massachusetts decreed that "liberty is the *fundamental* principle of our establishment." AMOS ADAMS, RELIGIOUS LIBERTY AS AN INVALUABLE BLESSING . . . (1768), *quoted in* BAILYN, *supra* note 199, at 262. Dissenters were free to seek exemption from taxation for the dominant church. BAILYN, *supra* note 199, at 262. There was "liberty of conscience, the rights of private judgment and [an acknowledgement of] the absurdity of advancing the kingdom of Christ by penal laws." AMOS ADAMS, RELIGIOUS LIBERTY AN INVALUABLE BLESSING . . . (1768), *quoted in* BAILYN, *supra* note 199, at 262 (alteration in original).

373. See CURRY, *supra* note 202, at 99.

374. ISAAC BACKUS, A SEASONABLE PLEA FOR LIBERTY OF CONSCIENCE, AGAINST SOME LATER OPPRESSIVE PROCEEDINGS . . . (1770), *quoted in* BAILYN, *supra* note 199, at 263.

375. *Id.*; see also JONATHAN MAYHEW, A SERMON PREACH'D IN THE AUDIENCE OF HIS EXCELLENCY WILLIAM SHIRLEY, ESQ., (1754), *reprinted in* THE WALL AND THE GARDEN 288, 304 (A.W. Plumstead ed., 1968) (in Massachusetts, "[i]t may be worth considering whether we have not some laws in force hardly reconcilable with that religious liberty which we profess").

D. Protection of Freedom of Conscience: The Meaning of "Free Exercise" of Religion

Free exercise of religion, as understood in the Founding Era, was grounded in the imperatives and protection of conscience. Religion was the expression of the beliefs dictated by conscience; restrictions on religious exercise were restraints on the freedom of conscience itself. Alexander Hamilton, in his polemic against the Quebec Bill, inflamed anti-British sentiment by framing the bill as an attack on the rights of a "Protestant Englishman" to "the free exercise of his religion" "in the manner his conscience dictates."³⁷⁶ In his famous *Memorial and Remonstrance Against Religious Assessments*, Madison wrote that "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held "by the same tenure" as "other rights."³⁷⁷ The close association (if not identity) between free exercise of religion and freedom of conscience was expressed in early state constitutions,³⁷⁸ in state ratification statements for the Federal Constitution,³⁷⁹ and in the early drafts of the

376. ALEXANDER HAMILTON, REMARKS ON THE QUEBEC BILL (1775), *reprinted in 1 WORKS OF ALEXANDER HAMILTON*, *supra* note 317, at 181, 193.

377. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in 2 THE WRITINGS OF JAMES MADISON*, *supra* note 265, at 183, 190.

378. *See, e.g.*, N.J. CONST. of 1776, XVIII, in 5 THORPE, *supra* note 240, at 2594, 2597 (protecting right to worship "Almighty God in a manner agreeable to the dictates of [one's] own conscience"); N.C. CONST. of 1776, A Declaration of Rights, Etc., XIX, in 5 THORPE, *supra* note 240, at 2787, 2788 ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences"); PA. CONST. of 1776, A Declaration of Rights of the Inhabitants of the Commonwealth or State of Pennsylvania, II, in 5 THORPE, *supra* note 240, at 3081, 3082 ("All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding."); VA. CONST. of 1776, Bill of Rights, § 16, in 7 THORPE, *supra* note 240, at 3812, 3814 (providing equal entitlement "to the free exercise of religion, according to the dictates of conscience").

379. Virginia, for instance, proposed that the Federal Constitution be amended to provide that "among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States." Supplement to the Journal of the Federal Convention (Ratification by the State of Virginia), in 1 ELLIOT'S DEBATES, *supra* note 276, at 327, 327. New York proposed "[t]hat the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience." Supplement to the Journal of the Federal Convention (Ratification by the State of New

First Amendment.³⁸⁰

Although the concept of religious liberty obviously differed in those colonies where religious establishments existed and in those where they did not, an examination of the speeches, writings, and other records of this era reveals nearly universal agreement among reformers that free religious exercise included freedom to pursue religious expression and worship as dictated

York), in *ELLIOT'S DEBATES*, *supra* note 276, at 327, 328. An earlier draft of the New York resolution, written by Hamilton, stated "that among other essential rights, the liberty of conscience and of the press cannot be cancelled or abridged by any authority of the United States." Alexander Hamilton, Draft of Proposed Ratification of the Constitution of the United States, with Specified Amendments, in 2 *WORKS OF ALEXANDER HAMILTON*, *supra* note 317, at 95, 96; *cf.* Ratifying Statement of New Hampshire, in 1 *ELLIOT'S DEBATES*, *supra* note 276 at 325, 326 ("Congress shall make no laws touching religion, or to infringe the rights of conscience.").

380. On June 8, 1789, Madison offered the following language to the House of Representatives: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 *ANNALS OF CONG.* 434 (Joseph Gales ed., 1834). During the ensuing debate, it was observed that Madison

apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion

Id. at 730 (Aug. 15, 1789). Later that day, Madison's proposal was amended by the House to read: "Congress shall make no laws touching religion, or infringing the rights of conscience." *Id.* at 732. The final version was adopted by the House on August 20, 1789. This language, proposed by Fisher Ames, read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.* at 766.

On September 9, 1789, the Senate adopted a different version, and sent this to the House. This version read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion" *JOURNAL OF THE FIRST SESSION OF THE SENATE* 77 (1820). On September 24, 1789, a House-Senate Conference Committee produced the final language: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" *Id.* at 86. This was accepted by the House on September 24, 1789, and by the Senate a day later. 1 *ANNALS OF CONG.*, *supra*, at 913; *JOURNAL OF THE FIRST SESSION OF THE SENATE*, *supra*, at 88.

by conscience and as one pleased. The ability to erect houses of worship, and to design them in the manner desired, were widely regarded as elements of religious exercise, even if denied to some. Adams regretfully wrote in a private letter, "I am an enemy to every appearance of restraint in a matter so delicate and sacred as the liberty of conscience; but the laws [in Massachusetts] do not permit Roman Catholics to have steeples to their churches, and these laws could not be altered."³⁸¹ Compulsory attendance at religious services in which one did not believe was also seen as a violation of the right to free religious exercise. The Delaware Constitution of 1792, although setting forth the "duty of all men frequently to assemble together for the public worship of the Author of the universe" for the promotion of "piety and morality," nevertheless acknowledged that "no man shall or ought to be compelled to attend any religious worship."³⁸² Jefferson's *A Bill for Establishing Religious Freedom* similarly guaranteed that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."³⁸³ His conviction that religious exercise included "religious institutions, their doctrines, discipline, [and] exercises" later led him to refuse to issue Presidential Thanksgiving Day proclamations directing the nation to observe a day of "fasting and prayer."³⁸⁴

The protection of religious expression was rooted in the belief that if government could restrict (or compel) religious expression, it could invade the right of the individual to determine, for himself, the religious opinions that he would hold. In *A Bill for Establishing Religious Freedom*, Jefferson wrote that governmental restraints on religious expression were the result of the "impious presumption of legislators and rulers, . . . who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible."³⁸⁵ Jef-

381. Letter from John Adams to Robert R. Livingston (Oct. 8, 1782), in 7 THE WORKS OF JOHN ADAMS, *supra* note 309, at 646, 648.

382. DEL. CONST. of 1792, art. I, § 1, in 1 THORPE, *supra* note 240, at 568, 568.

383. THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1777), reprinted in THE PORTABLE THOMAS JEFFERSON, *supra* note 207, at 251, 253.

384. Letter from Thomas Jefferson to the Rev. Samuel Miller (Jan. 23, 1808), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 176, at 428, 428-30.

385. THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1777),

ferson stated:

*[T]he opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being . . . judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own . . .*³⁸⁶

The danger presented was clear: If the state could restrict or compel religious expression, it could restrict or compel the process of belief itself.³⁸⁷

Whether "liberty of conscience" and "free exercise of religion," understood in this way, protected those who rejected *all* recognized religious faiths was a subject of intense debate. One congressman stated that he "hoped . . . the amendment [to the Federal Constitution] would be made in such a way as to secure the rights of conscience, and a free exercise of religion, but not to patronize those who professed no religion at all."³⁸⁸ Madison, in a private letter to Jefferson, expressed the fear that an attempt to enact a Federal Bill of Rights "could be a disservice" because

there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power. One of the objections in New England was that the Constitution by prohibiting religious tests, opened a door for Jews Turks [and] infidels.³⁸⁹

reprinted in THE PORTABLE THOMAS JEFFERSON, *supra* note 207, at 251, 251-52.

386. *Id.* at 252.

387. See James Madison, Address of the General Assembly to the People of the Commonwealth of Virginia, in 6 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 332, 337 (discussing the vital connection between the formation of religious belief and freedom in its expression).

388. Statement of Rep. Huntington, 1 ANNALS OF CONG., *supra* note 380, at 730-31 (Aug. 15, 1789).

389. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in THE COM-

Jefferson described similar fears during the passage of Virginia's Act for Establishing Religious Freedom. He later wrote that the Act's broad scope

met with opposition; but, with some mutilations in the preamble, it was finally passed; and a singular proposition proved that its protection of opinion was meant to be universal. Where the preamble declares, that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word "Jesus Christ," so that it should read, "a departure from the plan of Jesus Christ, the holy author of our religion;" the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohametan, the Hindoo, and Infidel of every denomination.³⁹⁰

Even those who argued that religious expression must be given a broad gauge, recognized that it could not be absolute. In an organized society, religious expression, like all other individual acts, must be constrained by the fundamental needs of social order. This outer limit was generally expressed in terms of "peace," "safety," and the reciprocal rights of others. In Madison's view, religious exercise must be protected unless "the preservation of equal liberty and the existence of the State are manifestly endangered."³⁹¹ In a private letter, Madison wrote, "I observe with particular pleasure the view that you have taken of the immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace."³⁹² Jefferson wrote, "it is time enough for the rightful purposes of civil government for its officers to interfere when [religious] principles break out into overt acts against peace and good order."³⁹³ The "legitimate powers of government extend to

PLETE MADISON, *supra* note 283, at 253, 253.

390. THOMAS JEFFERSON, *AUTOBIOGRAPHY*, reprinted in 1 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 1, 67.

391. James Madison, Amendments to the Declaration of Rights, 1 *THE PAPERS OF JAMES MADISON*, *supra* note 210, at 174, 175.

392. Letter from James Madison to Edward Livingston (July 10, 1822), in 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON*, *supra* note 321, at 273, 274.

393. THOMAS JEFFERSON, *A BILL FOR ESTABLISHING RELIGIOUS FREEDOM* (1777),

such acts only as are injurious to others."³⁹⁴ The Massachusetts Constitution of 1780 expressed similar sentiments. Under its terms, "no subject shall be hurt, molested, or restrained . . . for worshipping God in the manner and season most agreeable to the dictates of his own conscience . . . provided he doth not disturb the public peace, or obstruct others in their religious worship."³⁹⁵ Some defined these restraints in broader terms, adding infringements on "laws of morality,"³⁹⁶ "licentiousness,"³⁹⁷ or general social "well being"³⁹⁸ as among the valid grounds for the restriction of religious exercise. Oliver Ellsworth opined that the "civil power has a right, in some cases to interfere in matters of religion. It has a right to prohibit and punish gross immoralities and impieties . . ."³⁹⁹ Examples, to his mind, included "profane swearing, blasphemy, and professed atheism."⁴⁰⁰

The dangers of such broad calculations clearly disturbed reformers. Madison attacked the idea that "licentiousness" can be an exception to otherwise constitutionally-protected liberties:

The distinction between liberty and licentiousness is still a repetition of the Protean doctrine of implication, which is ever ready to work its ends by varying its shape. By its help,

reprinted in *THE PORTABLE THOMAS JEFFERSON*, *supra* note 207, at 251, 252-53.

394. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), reprinted in *THE PORTABLE THOMAS JEFFERSON*, *supra* note 207, at 21, 210.

395. MASS. CONST. of 1780, pt. I, art. II, in 3 THORPE, *supra* note 240, at 1888, 1889; see also GA. CONST. of 1777, art. LVI, in 2 THORPE, *supra* note 240, at 777, 784 ("All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State . . .").

396. See, e.g., MD. CONST. of 1776, A Declaration of Rights, Etc., XXXIII, in 3 THORPE, *supra* note 240, at 1686, 1689 ("[N]o person ought by any law to be molested . . . on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality . . .").

397. See, e.g., N.Y. CONST. of 1777, XXXVIII, in 5 THORPE, *supra* note 240, at 2623, 2637 ("Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.").

398. John Jay advocated denial of religious liberty to those who "hold and teach . . . principles incompatible and repugnant to the peace, safety, and well being of civil society." CURRY, *supra* note 202, at 162 (quoting John Jay).

399. *Id.* at 218 (quoting Oliver Ellsworth).

400. *Id.*

the judge as to what is licentious may escape through any constitutional restriction. Under it men of a particular religious opinion might be excluded from office, because such exclusion would not amount to an establishment of religion, and because it might be said that their opinions are licentious. And under it Congress might denominate a religion to be heretical and licentious, and proceed to its suppression.⁴⁰¹

In response to the argument "that Religion left entirely to itself may run into extravagances injurious both to Religion and to social order,"⁴⁰² Madison argued that governmental interference would be as likely to increase as to decrease that tendency.⁴⁰³ "The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded [against] by an entire abstinence of the [Government] from interference in any way whatever, beyond the necessity of preserving public order, [and] protecting each sect [against] trespasses on its legal rights by others."⁴⁰⁴ There must be trust, in a free society, that reason will prevail.⁴⁰⁵ "Great excitements are less apt to be permanent than to vibrate to the opposite extreme."⁴⁰⁶

The dual needs to protect freedom of belief and to preserve social order collided when test oaths were used for public office—a common colonial practice prior to the Revolution.⁴⁰⁷ The argu-

401. James Madison, Address of the General Assembly to the People of the Commonwealth of Virginia, in 6 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 332, 335-36.

402. Letter from James Madison to the Rev. Adams (1832), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 484, 487.

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.* at 485-87. Jefferson also believed that the best antidote to religious excess is freedom of thought. In his draft of the Virginia Act for Establishing Religious Freedom, he wrote:

[T]hat truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1777), *reprinted in* THE PORTABLE THOMAS JEFFERSON, *supra* note 207, at 251, 253.

407. See PFEFFER, *supra* note 199, at 252-56 (describing the universality of religious

ment in favor of such tests was simple: unless individuals feared God, and believed in a divine system of rewards and punishments, there would be no guarantee that they would feel subject to any moral constraints.⁴⁰⁸ Opponents responded that test oaths were, in themselves, no guarantee of moral fiber or integrity and that they opened the door to a far more pernicious consequence: the erection of human tribunals to determine religious preference and religious truth. When an objection was raised in the Massachusetts Ratifying Convention to the prohibition of religious tests for national public office contained in the proposed Federal Constitution,⁴⁰⁹ members of the religious community responded. Isaac Backus argued that "the imposing of religious tests hath been the greatest engine of tyranny in the world. And I rejoice to see so many gentlemen, who are now giving in their rights of conscience in this great and important matter."⁴¹⁰ Two somewhat more obscure clerics, Reverend Payson and Reverend Shute, also forcefully expressed their views. Reverend Payson argued that

the seat of religion in man being the heart or conscience, *i.e.*,

tests for public office throughout the colonies at the time of their declaration of independence from England); 1 STOKES, *supra* note 17, at 274 (same). Under English common law, no person could testify as a witness or affiant in a judicial proceeding unless he first asserted a belief in a Supreme Being and in a divine scheme of rewards and punishments. PFEFFER, *supra* note 199, at 256. The American colonies continued this disqualification of professed disbelievers. *Id.* at 257. In the original version of the Federal Judiciary Act of 1789, for instance, no witness could testify who "did not believe that there is a God who rewards truth and avenges falsehood." Federal Judiciary Act of 1789, *quoted in* PFEFFER, *supra* note 199, at 257.

408. *See, e.g.*, Statement of Rev. Shute, Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Jan. 30, 1788), in 2 ELLIOT'S DEBATES, *supra* note 276, at 118-19. Luther Martin of Maryland wrote that, regarding officeholders, "it would be at *least decent* to hold out some distinction between the professors of Christianity and downright infidelity or paganism." 2 THE COMPLETE ANTI-FEDERALIST 75 (Herbert J. Storing ed., 1981).

409. *See* Proceedings of the Constitutional Convention (Aug. 30, 1787), in 1 ELLIOT'S DEBATES, *supra* note 276, at 277 ("[N]o religious test shall ever be required as a qualification to any office or public trust under the authority of the United States . . ."). For a discussion of the history of this Clause, see 1 STOKES, *supra* note 17, at 523-27.

410. Statement of Rev. Backus, Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Feb. 4, 1788), in 2 ELLIOT'S DEBATES, *supra* note 276, at 148.

the reason God has given us, employed on our moral actions . . . God alone is the God of the conscience, and, consequently, attempts to erect human tribunals for the consciences of men are impious encroachments upon the prerogatives of God. Upon these principles, had there been a religious test as a qualification for office, it would . . . have been a great blemish upon the instrument.⁴¹¹

Reverend Shute argued that:

In this great and extensive empire, there is, and will be, a great variety of sentiments in religion among its inhabitants. Upon the plan of a religious test, the question . . . must be, Who shall be excluded from national trusts? Whatever answer bigotry may suggest, the dictates of candor and equity, I conceive, will be, *None*.

. . . I believe . . . that there are worthy characters among men of every denomination—among the Quakers, the Baptists, the Church of England, the Papists; and even among those who have no other guide, in the way to virtue and heaven, than the dictates of natural religion.⁴¹²

Opposition came from those who held secular office, as well. Oliver Wolcott argued that religious test oaths are unnecessary because "God . . . is the avenger of perjury."⁴¹³ In an open letter to his constituents, Oliver Ellsworth wrote that the constitutional prohibition on test oaths was intended to "exclude persecution, and to secure to you the important right of religious liberty."⁴¹⁴ Although limiting his discussion to distinctions

411. Statement of Rev. Payson, Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Jan. 30, 1788), in 2 ELLIOT'S DEBATES, *supra* note 276, at 120.

412. Statement of Rev. Shute, Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Jan. 30, 1788), in 2 ELLIOT'S DEBATES, *supra* note 276, at 118-19.

413. Statement of Oliver Wolcott, Fragments of the Debates in the Convention of the State of Connecticut on the Adoption of the Federal Constitution (Jan. 9, 1788), in 2 ELLIOT'S DEBATES, *supra* note 276, at 202.

414. See OLIVER ELLSWORTH, THE LANDHOLDER, VII, (1787), reprinted in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788, at 167, 168 (Paul L. Ford ed., 1892) [collection as a whole hereinafter ESSAYS]; see also *id.* at 169 ("A test in favour of any one denomination of Christians would be to the last degree absurd in the United States. If it were in favour of either congregationalists, presbyterians, episcopalians, baptists, or quakers,

among Christians,⁴¹⁵ he argued that

[i]n our country every man has a right to worship God in that way which is most agreeable to his conscience. If he be a good and peaceable person he is liable to no penalties or incapacities on account of his religious sentiments

. . . .
If any test-act were to be made, perhaps the least exceptionable would be one, requiring all persons appointed to office to declare . . . their belief in the being of a God, and in the divine authority of the scriptures. . . . [I]t may be said, that one who believes these great truths, will not be so likely to violate his obligations to his country But I answer: His making a declaration of such a belief is no security at all. For suppose him to be an unprincipled man . . . how easy is it for him to dissemble! how easy is it for him to make a public declaration of his belief in the creed which the law prescribes In short, test-laws are utterly ineffectual: they are no security at all; because men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences.⁴¹⁶

Ellsworth acknowledged that the civil power has a right to interfere in matters of religion when "gross immoralities and impieties"⁴¹⁷ are involved. He noted, however, "[l]egislatures have no right to set up an inquisition, and examine into the private opinions of men. Test-laws are useless and ineffectual, unjust and tyrannical; therefore the Convention have done wisely in excluding this engine of persecution"⁴¹⁸

The principle of the equality of religious sects, which lay be-

it would incapacitate more than three-fourths of the American citizens for any publick office").

415. *Id.* at 169.

416. *Id.* at 168-70.

417. *Id.* at 171.

418. *Id.* Ellsworth gave as examples of the proper sphere of the civil power those laws that prohibited and punished "drunkenness, profane swearing, blasphemy, and professed atheism." *Id.* The apparent inconsistency of such laws with the principles of freedom of belief and equality of religious sects (which underlay his opposition to test oaths) did not appear to concern him.

hind principles of free exercise, also animated opposition to the framing of these rights in the language of "toleration." The freedom to believe and the freedom to express that belief were rooted in the concept of the equality of all; these principles did not allow the favored status of some and the "toleration" of others. In strident terms, Thomas Paine condemned toleration as "not the *opposite* of Intolerance, but . . . the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding Liberty of Conscience, and the other of granting it."⁴¹⁹ Isaac Backus attacked toleration as part of the legislature's power to "compel acceptance of its own definition of proper religious practice."⁴²⁰ The insistence that free religious exercise be framed in terms of equality, not toleration, was stated most eloquently in Madison's great *Memorial and Remonstrance*:

If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of conscience" Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.⁴²¹

Belief that freedom of conscience required religious equality motivated the rejection of "toleration" and support for free religious exercise within the broadest constraints that maintenance of civil order would allow.

Freedom of conscience and equality also provided the deepest foundations for the second great principle: freedom from the establishment of religion by government.

419. PAINE, *supra* note 334, at 65.

420. ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY (1773), *quoted in* BAILYN, *supra* note 199, at 266.

421. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 183, 186.

E. The Meaning of the Second Great Principle: Freedom from Establishment of Religion by Government

The nature of colonial religious establishments and the state establishments that succeeded them is described at length above.⁴²² In the New England, middle-Atlantic, and southern areas, religious establishments varied but were admixtures of the same basic characteristics: taxpayer assistance to religious institutions, state enforcement of favored religious observance and conformity, religious tests for public office or general civil capacity, and other preferential treatment on the basis of religious affiliation or belief.⁴²³ Although attempts to enforce or prohibit particular religious practices declined by the time of the Revolution, and systems designating single religious institutions as recipients of state financial assistance were largely replaced by systems implementing taxpayer choice, deeply institutionalized schemes of governmental religious preference existed throughout the colonies at the dawn of the Founding Era.⁴²⁴

There has been much debate over whether the First Amendment to the Constitution was intended to prohibit all federal financial aid to religious institutions.⁴²⁵ Whatever the particular intentions of the framers of this document, it is clear that an "establishment," in the general understanding of the time, encompassed any tax monies given directly to a religious institution, whether designated by the state or by the taxpayer's choice. By the time of the Revolution, schemes of taxpayer choice had succeeded single payee plans in New England and else-

422. See *supra* part III.B.

423. See *supra* notes 199-269 and accompanying text.

424. See *supra* notes 199-269 and accompanying text.

425. Several commentators have argued that the Establishment Clause intended to permit nonpreferential aid to religious institutions. See, e.g., BERNs, *supra* note 7, at 31; ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 15 (1982); MALBIN, *supra* note 307, at 14; Edward S. Corwin, *The Supreme Court as National School Board*, 14 *LAW & CONTEMP. PROBS.* 3, 20 (1949). Others have argued that the prohibited "establishment" included financial support of any kind. See, e.g., CURRY, *supra* note 202, at 215; LEVY, *supra* note 314, at 84; William W. Van Alstyne, *What is "An Establishment of Religion"?*, 65 *N.C. L. REV.* 909, 912 (1987). The debate has recently been extended to state laws and constitutions as well. See CURRY, *supra* note 202, at 159-60 (discussing language in the Delaware and New Jersey Constitutions).

where,⁴²⁶ and these programs clearly were understood to be "establishments" as well.

Fisher Ames, in describing the virtues of New England arrangements, wrote that they required "the establishment of a learned clergy, and [the] obliging [of] every small district to support a minister."⁴²⁷ Responding to a criticism of the laws of Massachusetts, which "compelled men to pay to the building of [their] churches and support of ministers, . . . [and] to go to some known religious assembly on first days," Adams stated that "the laws of Massachusetts were the most mild and equitable establishment of religion that was known in the world, if indeed they could be called an establishment . . ."⁴²⁸ James Madison, discussing the meaning of "religious Establishments," framed the question in a private letter as "whether a support of . . . the [Christian] religion . . . ought . . . [in] so far at least as pecuniary means are involved, to be provided for by the Gov[ernment] rather than be left to the voluntary provisions of those who profess it."⁴²⁹ He opposed the Virginia "Bill establishing a provision for Teachers of the Christian Religion," which allowed taxpayers to choose religious denominations or "seminaries of learning" for the receipt of tax monies, as a scheme creating a religious "establishment."⁴³⁰

426. From 1727 onward, establishment schemes in Massachusetts and Connecticut exempted Baptists and Quakers from paying ministerial taxes, and Anglicans were permitted to designate their taxes for their own priests' support. CURRY, *supra* note 202, at 89. The Massachusetts Constitution of 1780 provided, for instance, that taxes would be collected for the support of "public Protestant teachers of piety, religion, and morality." MASS. CONST. of 1780, pt. I, art. III, in 3 THORPE, *supra* note 240, at 1888, 1890. Taxpayers could designate recipients for their levies; if there was no designation, the tax would be paid toward "the support of the teacher or teachers of the parish or precinct in which the said moneys are raised." *Id.* See generally LEVY, *supra* note 314, at 1-62 (discussing multiple establishments in the American colonies and states).

427. FISHER AMES, PHOCION. NO. IV (Apr., 1801), in 2 WORKS OF FISHER AMES, *supra* note 282, at 162, 163.

428. John Adams, diary entry of Oct. 14, 1774, in 2 THE WORKS OF JOHN ADAMS, *supra* note 309, at 398-99.

429. Letter from James Madison to Rev. Adams (1832), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 484, 485.

430. See JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 183; see also Thomas Jefferson, Bill for Establishing Religious Freedom (1777) (origi-

The meaning of a religious "establishment" in the parlance of the time is discussed at length in a rather remarkable polemic written by Hamilton in response to the Quebec Bill, passed by the English Parliament in 1774.⁴³¹ After discussing the Bill's failures in various areas of civil government, Hamilton proceeded "next to examine it with relation to religion, and to endeavor to show that the Church of Rome has now the sanction of a legal establishment in the province of Quebec."⁴³² Quoting a "certain writer," Hamilton wrote that "[a]n established religion . . . is a religion which the civil authority engages not only to protect but to support."⁴³³ This Bill, Hamilton wrote, "[t]his act makes effectual provision not only for the protection but for the permanent support of Popery"⁴³⁴ He continued:

The [Catholic] clergy "may hold, receive, and enjoy their accustomed dues and rights." They may if they please. It is at their option . . . ; and, consequently, there must be a correspondent obligation upon their parishioners to comply with that will, and to pay those dues when required. . . .

. . . [I]f a church [has property in tithes], . . . it is plain the laws must have made provision for its support, or, in other words, must have established it.

. . . .

The characteristic difference between a tolerated and established religion consists in this: With respect to the support of the former, the law is passive and improvident, leaving it to those who profess it to make as much, or as little, provision as they shall judge expedient; and to vary and alter that provision, as their circumstances may require. . . . But with

nal draft), in *THE PORTABLE THOMAS JEFFERSON*, *supra* note 207, at 251 (arguing that taxpayer-designated assessment schemes violated true freedom of choice and religious liberty); CURRY, *supra* note 202, at 146-47 (discussing usage in Virginia). Curry has argued that although anti-establishment rhetoric often was framed in terms of denominational preference, this distinction was more a matter of language than substance. *Id.* at 197-98. The distinction between preferential and non-preferential aid, made by modern scholars, was not made by those of the Founding Era. *Id.* at 211.

431. See ALEXANDER HAMILTON, REMARKS ON THE QUEBEC BILL, *reprinted in* 1 WORKS OF ALEXANDER HAMILTON, *supra* note 317, at 181.

432. *Id.* at 187.

433. *Id.*

434. *Id.*

respect to the support of the latter, the law is active and provident. Certain precise dues (tithes, etc.) are legally annexed to the clerical office, independent on the liberal contributions of the people While tithes were the free, though customary, gift of the people, as was the case before the passing of the [A]ct in question, the Roman Church was only in a state of toleration; but when the law came to take cognizance of them, and, by determining their permanent existence, destroyed the free agency of the people, it then resumed the nature of an establishment⁴³⁵

Although religious "establishments" were thought broadly to include religious tests for office and other religious preferences established by law,⁴³⁶ the simultaneous prohibition of religious establishments and the existence of religious tests and other religious privileges appeared to go unchallenged. In the Delaware Constitution of 1776, for instance, a required oath of office professing belief "in God the Father, and in Jesus Christ His

435. *Id.* at 188-91.

436. *See, e.g.,* Supplement to The Journal of the Federal Convention (Ratification by the State of New York), in 1 ELLIOT'S DEBATES, *supra* note 276, at 327, 328 (stating that "no religious sect or society ought to be favored or established by law in preference to others"); Supplement to The Journal of the Federal Convention (Ratification by the State of Rhode Island), in 1 ELLIOT'S DEBATES, *supra* note 276, at 334 (same); Statement of Oliver Wolcott, Fragments of the Debates in the Convention of the State of Connecticut on the Adoption of the Federal Constitution (Jan. 9, 1788), in 2 ELLIOT'S DEBATES, *supra* note 276, at 202 (discussing religious tests for public office: ". . . I do not believe that the United States would ever be disposed to establish one religious sect and lay all others under legal disabilities."). *See generally* James Madison, Address of the General Assembly to the People of the Commonwealth of Virginia, in 6 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 332 (implying that religious tests for office constitute "an establishment of religion").

A broad understanding of religious establishments was also reflected in those laws that favored church-state integration. *See, e.g.,* S.C. CONST. of 1778, XXXVIII, in 6 THORPE, *supra* note 240, at 3248, 3255-56 (stating that "[t]he Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State" and promulgating five articles of faith that a religious group must profess before it could achieve recognition); Connecticut Act for Securing the Rights of Conscience (1784), *quoted in* COBB, *supra* note 199, at 501 ("[N]o persons *professing the Christian religion*, who soberly dissented from the worship and ministry *established by law*, . . . should incur a penalty by not attending the established worship"; dissenters could use "the same powers for maintaining their respective societies" (including receipt of tax receipts) "as belonged to societies established by law").

only Son, and in the Holy Ghost, one God, blessed for evermore" coexisted with a provision that "[t]here shall be no establishment of any one religious sect in this State in preference to another."⁴³⁷ In another twist, the South Carolina Constitution of 1778 declared the "Christian Protestant religion" to be "the established religion of this State" and included the elaborate prescription of articles of faith which must be accepted before a religious group could reach this "incorporated and esteemed" status.⁴³⁸ The same constitution, however, made it illegal to compel a citizen "to pay towards the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support."⁴³⁹ Many who rejected governmental financial aid to religion still supported test oaths, restriction of public office holding to Christians or to Protestants, and the enforcement of blasphemy laws.⁴⁴⁰ The most likely explanation for such contradictions lies not in a differing understanding of what an "establishment" was, but in the common (unquestioned) assumption that these were Protestant Christian states, where the only issue concerned the legal preference or "establishment" of particular Protestant groups.

The reasons for the growth and persistence of religious establishments were complex and undoubtedly ranged from the attempted consolidation of spiritual and political power to deep concerns about the nature of religious duty and its role in organized society. Of particularly lasting concern, both to those who advocated the maintenance of religious establishments and to those who advocated their abolition, were the common beliefs that religious establishments were necessary for the survival of both religion and the state. Both beliefs were brought to these shores from Europe, and both were heavily entrenched in all

437. DEL. CONST. of 1776, arts. 22, 29, in 1 THORPE, *supra* note 240, at 562, 566-67. These provisions were deleted in the Delaware Constitution of 1792, which stated that no "preference [shall] be given by law to any religious societies, denominations, or modes of worship." DEL. CONST. of 1792, art. I, § 1, reprinted in 1 THORPE, *supra* note 240, at 568, 568.

438. S.C. CONST. of 1778, XXXVIII, in 6 THORPE, *supra* note 240, at 3248, 3255-56.

439. *Id.* at 3257. These provisions were not retained by the Constitution of 1790. See S.C. CONST. of 1790, in 6 THORPE, *supra* note 240, at 3258.

440. See CURRY, *supra* note 202, at 170-71.

regions and in all social and religious classes—even among those who often dissented from the particular establishments chosen.⁴⁴¹

Although the belief that government establishment was necessary for the promotion (and even the survival) of religion was clearly not universal, it is found throughout the writings of this era. Fisher Ames wrote that the “establishment of a learned clergy” was necessary “for the support of good morals and true religion.”⁴⁴² The Constitution of Massachusetts provided for the “support and maintenance of public Protestant teachers of piety, religion, and morality” as necessary for the promotion of religion and “the institution of the public worship of God, and of public instructions in piety, religion, and morality.”⁴⁴³ A perceived “decline in religiosity” in Virginia in the 1780s led to the introduction of two bills to aid religion, one for the incorporation of the Protestant Episcopal Church and one to levy a “General Assessment” to be used to support teachers of the Christian religion.⁴⁴⁴ The supporters of the latter argued that they “ha[d] with much concern observed a general Declension of Religion for a number of Years past” and that the bill was necessary “to aid [and] patronize Religion.”⁴⁴⁵ Leo Pfeffer has written that

441. For example, Presbyterians in Virginia originally voiced support for the Virginia “General Assessment” bill, apparently because they (along with other Christian sects) would have been its beneficiaries. See MILLER, *supra* note 9, at 29-31. They later changed their position, fearing that the bill would, in the last analysis, lead to a resurgence in the power of the established Episcopal church. *Id.* at 40-41.

442. FISHER AMES, PHOCION. NO. IV, reprinted in 2 WORKS OF FISHER AMES, *supra* note 282, at 162, 163.

443. MASS. CONST. of 1780, pt. I, art. III, in 3 THORPE, *supra* note 240, at 1888, 1889-90.

444. McDONALD, *supra* note 202, at 44. Patrick Henry, who spoke out critically against the established Episcopal Church on numerous occasions, nevertheless drafted and supported the Virginia “General Assessment” bill. MILLER, *supra* note 9, at 25-27. This bill assessed a property tax used to pay clergy and maintain church buildings. The taxpayer could designate the Christian denomination to receive his money. If no choice was made, the money was used to support the building of schools in the taxpayer’s county. If the taxpayer’s denomination had no clergy, the money would go into the general fund “to promote [the taxpayer’s] particular mode of worship.” *Id.* at 26.

445. JOURNAL OF THE HOUSE OF DELEGATES (Va.) (Oct., 1784), quoted in 1 STOKES, *supra* note 17, at 388-89. The supporters of this bill argued:

[T]hat should [religion] . . . decline with nearly the same rapidity in

in Virginia,

[t]his was the crucial issue: was the support of religion the concern of the state, or was it a matter to "be left to voluntary contribution"? The lines were clear; to one group, liberty meant disestablishment and separation and voluntariness, because man's relation to his Maker was not within the jurisdiction of civil government; to the other, establishment meant "order and internal tranquility, true piety and virtue . . . peace and happiness," and was therefore quite properly a state responsibility.⁴⁴⁶

Future, your Petitioners apprehend Consequences dangerous, if not fatal to the Strength and Stability of Civil Government. *** Were all Sense of Religion rooted out of the Minds of Men, scarce any thing would be left on which human Laws would take hold. *** Your Petitioners therefore think that those who legislate, not only have a Right, founded upon the principle of public utility, but as they wish to promote the Virtue and Happiness of their Constituents & the good People of the State in general; as they wish well to the Strength and Stability of Government, they ought to aid & patronize Religion As every Man in the State partakes of the Blessings of Peace and Order, which results no less from religion than the operation of the laws, so every Man should be obliged to contribute as well to the Support of Religion, as that of Civil Government nor has he any Reason to complain of this, as an Encroachment upon his religious Liberty, if he is permitted to worship God according to the Dictates of his Conscience.

Id. (star alterations in original); *cf.* MILLER, *supra* note 9, at 28 (noting that in the view of the bill's supporters, a republican governmental foundation required public virtue, public virtue required morality, and morality required state-supported religious institutions).

446. PFEFFER, *supra* note 199, at 108 (footnote omitted). The existence of choice for dissenters rendered establishment plans acceptable to some who might otherwise have opposed them. George Washington wrote to George Mason:

Altho. no man's sentiments are more opposed to *any kind* of restraint upon religious principles than mine are, yet I must confess, that I am not amongst the number of those who are so much alarmed at the thoughts of making people pay towards the support of that which they profess, if of the denomination of Christians; or declare themselves Jews, Mohamitans or otherwise, and thereby obtain proper relief.

Letter from George Washington to George Mason (Oct. 3, 1785), *quoted in* Paul F. Boller, Jr., *George Washington on Religious Liberty*, 17 WM. & MARY Q. 486, 490 (1960); *see also* JOHN TUCKER, REMARKS ON A DISCOURSE OF THE REV. JONATHAN PARSONS, OF NEWBURYPORT, DELIVERED ON THE 5TH OF MARCH LAST, AND ENTITLED, FREEDOM FROM CIVIL AND ECCLESIASTICAL SLAVERY, THE PURCHASE OF CHRIST 5, 10-12 (1774) (arguing that there can be no valid objection to a demand that one support one's own minister); CURRY, *supra* note 202, at 203 (discussing the view that no violation of conscience was presented by a taxation plan which forced no one to

Support for religious establishments was often framed in terms of religious duty. Attempting to justify his refusal to condemn the Massachusetts establishment before a self-assembled tribunal of Quakers, John Adams cited the fact that the "consciences [of the people of Massachusetts] dictated to them that it was their duty to support those laws."⁴⁴⁷

Because religion was believed to be necessary for morality, and morality was necessary for the survival of society and its governmental institutions, supporters made attempts to justify the existence of state religious establishments on this ground as well. Without the "precious security" of financial support for religious institutions, Fisher Ames wrote, "the attempt will be vain to adopt the laws and institutions of our ancestors."⁴⁴⁸ Rufus King argued that Christianity was entitled to special state support and protection because its belief that the deeds of this world would be rewarded or punished was a necessary foundation for the force of moral law.⁴⁴⁹ Numerous state constitutions set forth special financial support or prerogatives for particular religious groups, citing the "duty" of citizens to worship God or the necessity of religion and religious institutions for the preservation of social order and government.⁴⁵⁰ In an odd twist to this belief, Patrick Henry attacked the Anglican clergy's resistance to the Virginia Two Penny Act of 1759 on the ground that the clergy had failed to fulfill the mission that established churches must meet: the "enforce[ment] [of] obedience to civil sanctions."⁴⁵¹ "[W]hen . . . clergy cease to answer these ends, the community have no further need of their ministry, and may

support a religion other than his own).

447. John Adams, diary entry of Oct. 14, 1774, in 2 THE WORKS OF JOHN ADAMS, *supra* note 309, at 399.

448. FISHER AMES, PHOCION. NO. IV, in 2 WORKS OF FISHER AMES, *supra* note 282, at 162, 163.

449. See ERNST, *supra* note 183, at 381.

450. See, e.g., MD. CONST. of 1776, A Declaration of Rights, Etc., XXXIII, in 3 THORPE, *supra* note 240, at 1686, 1689; MASS. CONST. of 1780, pt. I, art. III, in 3 THORPE, *supra* note 240, at 1888, 1889; S.C. CONST. of 1778, XXXVIII, in 6 THORPE, *supra* note 240, at 3248, 3256.

451. 1 WILLIAM W. HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 41 (1891).

justly strip them of their appointments"⁴⁵²

The general desire for protection of free religious exercise, together with a belief in the fundamental role of religion in society and government, led to complex, conflicting, and ambiguous views of religious institutions. The positive role of religious institutions in fostering the moral restraints necessary for the maintenance of social bonds and republican government was widely believed and widely acknowledged.⁴⁵³ Those who advocated state aid for religious purposes were particularly articulate in expressing the importance of religious institutions. In a private letter, John Jay wrote:

Although the mere *expediency* of public measures may not be a proper subject for the pulpit, . . . it is the right and the duty of our pastors to press the observance of all moral and religious duties, and to animadvert on every course of conduct which may be repugnant to them.⁴⁵⁴

In a later address, Jay rejoiced that:

A zeal unknown to many preceding ages has recently pervaded almost every Christian country, and occasioned the establishment of institutions well calculated to diffuse the knowledge and impress the precepts of the Gospel both at home and abroad. . . .

We have reason to rejoice that such institutions have been so greatly multiplied and cherished in the United States⁴⁵⁵

Benjamin Rush stated that "the only foundation for a useful education in a republic is to be laid in Religion. Without this there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments."⁴⁵⁶ The power of religious education came both from the

452. *Id.*

453. See, e.g., MILLER, *supra* note 9, at 47-48 (discussing the church's role in the "social order"); Robert N. Bellah, *Religion and the Legitimation of the American Republic*, in BELLAH & HAMMOND, *supra* note 14, at 3, 16-17 (discussing prevailing beliefs in the ability of religious institutions to inculcate republican values).

454. Letter from John Jay to Rev. Jedidiah Morse (Jan. 1, 1813), in 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 318, at 365, 365-66.

455. John Jay, Address to the Annual Meeting of the American Bible Society (May 13, 1824), in 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 318, at 493, 497.

456. Benjamin Rush, *Benjamin Rush on Republican Education, 1798* in 1 AMERICAN

power of its message and from its extraordinarily wide audience. Adams wrote in his diary that:

One great advantage of the Christian religion is that it brings the great principle of the law of nature and nations—Love your neighbor as yourself, and do to others as you would that others should do to you—to the knowledge, belief, and veneration of the whole people. . . . No other institution for education, no kind of political discipline, could diffuse this kind of necessary information, so universally among all ranks and descriptions of citizens. The duties and rights of the man and the citizen are thus taught from early infancy to every creature.⁴⁵⁷

The potential power of religious institutions was not, however, an unmitigated blessing. It created fear as well as promise. Belief in the necessity of religiously-based values for social and governmental cohesion, and belief in the importance of religious institutions in the propagation of those values, did not lead to the conclusion that religious institutions should be involved in governmental affairs. With the exception of early theocracies in the New England colonies,⁴⁵⁸ the relationship between institutional church and state was viewed as a one-way street—government was free to aid religious institutions, but religious institutions were precluded from involvement in the affairs of government. Even New England Federalists, who gave actual or tacit approval to existing schemes of state support for religious institutions, distrusted the involvement of those institutions in governmental affairs. Although the inculcation of moral values was seen as a vital and legitimate function of religious institutions, the involvement of these institutions in the structures of political power was not. On this point, Adams was

HIGHER EDUCATION: A DOCUMENTARY HISTORY 170, 170 (Richard Hofstadter & Wilson Smith eds., 1961) (excerpted from BENJAMIN RUSH, ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL (1806)).

457. John Adams, diary entry of Aug. 14, 1796, in "IN GOD WE TRUST," *supra* note 217, at 99-100.

458. See CURRY, *supra* note 202, at 4-6, 82-83 (discussing the Puritans who settled Massachusetts and Connecticut and their hopes to build communities with governmental and religious institutions united in the "true Christian religion").

particularly adamant. In a letter to Jefferson, he wrote:

The question before the human race is, Whether the God of nature shall govern the World by his own laws, or Whether Priests and Kings shall rule it by fictitious Miracles? Or, in other Words, whether Authority is originally in the People? or whether it has descended for 1800 years in a succession of Popes and Bishops, or brought down from Heaven by the holy Ghost in the form of a Dove, in a Phyal of holy Oil?⁴⁵⁹

In discussing a proposed parliamentary tax, Adams stated that

[i]t spread an universal alarm It excited a general and just apprehension, that bishops, and dioceses, and churches, and priests, and tithes, were to be imposed on us by Parliament. . . . [I]f Parliament could tax us, they could establish the Church of England, with all its creeds, articles, tests, ceremonies, and tithes, and prohibit all other churches, as conventicles and schism shops.⁴⁶⁰

Throughout his later writings, Jay similarly and incessantly argued against the involvement of church authorities in civil affairs.⁴⁶¹

Those religious groups, such as Roman Catholics and Episcopalians, who had established ecclesiastical structures and histories of involvement in government, were the particular objects of denunciation and alarm. Opposition to state support of religious institutions was often linked to overt anti-clericalism.⁴⁶² Adams wrote, "I do not like the late Resurrection of the Jesuits. . . . Our

459. Letter from John Adams to Thomas Jefferson (June 20, 1815), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 281, at 445, 445. In his diary, Adams wrote: "Where do we find a precept in the Gospel requiring Ecclesiastical Synods? Convocations? Councils? Decrees? Creeds? Confessions? Oaths? Subscriptions? and whole cart-loads of other trumpery that we find religion encumbered with in these days?" John Adams, diary entry of Feb. 18, 1756, in 2 *THE WORKS OF JOHN ADAMS*, *supra* note 309, at 5-6.

460. Letter from John Adams to H. Niles (Feb. 13, 1818), in 10 *THE WORKS OF JOHN ADAMS*, *supra* note 309, at 282, 288.

461. See "IN GOD WE TRUST," *supra* note 217, at 360.

462. Jonathan Mayhew, in a famous pamphlet published in 1763, warned that if the Church of England were established in New England, religious oaths would follow "and all of us [would] be taxed for the support of *bishops* and their *underlings*." JONATHAN MAYHEW, *OBSERVATIONS ON THE CHARTER AND CONDUCT OF THE SOCIETY* (1763), *quoted in* BAILYN, *supra* note 199, at 256.

System . . . of Religious Liberty must afford them an Assylum. But if they do not put the Purity of our Elections to a severe Tryal, it will be a Wonder."⁴⁶³ Rufus King, himself an Episcopalian, nevertheless opposed the establishment of the Church's hierarchy in America. "I never liked the Hierarchy of the Church," he wrote, and "if the clergy combine, they will have their influence on Government."⁴⁶⁴ Although a traditional religionist in many ways, Jay also wrote of the dangers of the clerical structures of the Episcopal Church:

There never was a time when those doctrines promoted peace on earth or good-will among men. Originating under the auspices and in the days of darkness and despotism, they patronized darkness and despotism down to the Reformation. Ever encroaching on the rights of governments and people, they have constantly found it convenient to incorporate, as far as possible, the claims of the clergy with the principles and practice of religion

To you it cannot be necessary to observe, that high Church doctrines are not accommodated to the state of society, nor to the tolerant principles, nor to the ardent love of liberty which prevail in our country.⁴⁶⁵

Even those state constitutions that were replete with all forms of religious establishments took strong steps to bar the involvement of the institutional church in government. The South Carolina Constitution barred all clergymen from the offices of governor and lieutenant governor, from membership on the privy council, and from service in the legislature until two years after leaving the ministry.⁴⁶⁶ The Georgia Constitution prohibited a

463. Letter from John Adams to Thomas Jefferson (May 6, 1816), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 281, at 472, 474. Jefferson, in a letter to Adams, wrote of one of his previous letters: "The last is on the subject of religion, and by it's publication will gratify the priesthood with new occasion of repeating their Condemnations against me. They wish it to be believed that he can have no religion who advocates it's freedom." Letter from Thomas Jefferson to John Adams (June 15, 1813), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 281, at 331, 331.

464. Letter from Rufus King to Elbridge Gerry (May 8, 1785), *quoted in* ERNST, *supra* note 183, at 56-57.

465. Letter from John Jay to the Corporation of Trinity Church, in 4 *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY*, *supra* note 318, at 505, 513-14.

466. S.C. CONST. of 1778, XXI, in 6 THORPE, *supra* note 240, at 3248, 3253.

"clergyman of any denomination" from serving in the state legislature,⁴⁶⁷ as did the constitutions of Delaware, New York, North Carolina, and Maryland.⁴⁶⁸

Although these provisions often purported to be efforts to "encourage religion and religious teaching"⁴⁶⁹ or to ensure that religious teachers would "not . . . be diverted from the great duties of their function,"⁴⁷⁰ the fact that such periods of disability often extended beyond the period of the actual holding of religious office indicates that they were motivated, at least in part, by a far greater concern—the danger of institutional merger of church and state.

Reformers attacked all three assumptions of those who favored religious establishments: that establishments were necessary for religion, that establishments were necessary for republican government, and that state aid could be given to religious institutions while maintaining their preclusion from the affairs of government. James Madison launched a most concerted attack upon the theoretical underpinnings of establishment theories. In his famous *Memorial and Remonstrance Against Religious Assessments*, he argued that state funding for teachers of Christianity must be opposed "[b]ecause the establishment proposed by the Bill is not requisite for the support of the Christian Religion," "[b]ecause experience witnesseth that ecclesiastical

467. GA. CONST. of 1777, art. LXII, in 2 THORPE, *supra* note 240, at 777, 785.

468. DEL. CONST. of 1776, art. 29, reprinted in 1 THORPE, *supra* note 240, at 562, 567-68 ("[N]o clergyman or preacher of the gospel, of any denomination, shall be capable of holding any civil office in this State, or of being a member of either of the branches of the legislature, while they continue in the exercise of the pastoral function."); MD. CONST. of 1776, The Constitution, or Form of Government, Etc., XXXVII, in 3 THORPE, *supra* note 240, at 1686, 1697 ("[N]o . . . minister, or preacher of the gospel, of any denomination . . . shall have a seat in the General Assembly or the Council of this State."); N.Y. CONST. of 1777, XXXIX, in 5 THORPE, *supra* note 240, at 2623, 2637 ("[N]o minister of the gospel, or priest of any denomination whatsoever, shall, at any time hereafter, under any pretence or description whatever, be eligible to, or capable of holding, any civil or military office or place within this State."); N.C. CONST. of 1776, The Constitution, or Form of Government, Etc., XXXI, in 5 THORPE, *supra* note 240, at 2787, 2793 ("[N]o clergyman, or preacher of the gospel, of any denomination, shall be capable of being a member of either the Senate, House of Commons, or Council of State, while he continues in the exercise of the pastoral function.").

469. McDONALD, *supra* note 202, at 43 n.42.

470. S.C. CONST. of 1778, XXI, in 6 THORPE, *supra* note 240, at 3248, 3253.

establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation," and "[b]ecause the establishment in question is not necessary for the support of Civil Government."⁴⁷¹ Madison attacked the chain of reasoning of establishment proponents at its root, arguing that state support was, in fact, antithetical to religious freedom, and undermined the role that religious values might play in the maintenance of civil society and government. He wrote:

If . . . [an establishment] be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to civil Government? What influences in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people.⁴⁷²

In his later years, Madison reflected extensively upon these questions, and what he felt was empirical proof of the truth of his opinions. In private letters, Madison observed that

the prevailing opinion in Europe, England not excepted, has

471. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 183, 187, 188. In a speech on the floor of the Virginia House of Delegates, Madison argued that the "decay of public morals" of which the measure's proponents complained was not due to the absence of

any legal provision for the support of religion, but was the result, in general, of a long-continued state of war, of bad laws, and of a loose administration of justice; and that the true and proper remedies would be found in . . . peace, in laws cherishing virtue, in a more regular administration of justice, and in the influence of good example and of voluntary religious associations.

1 STOKES, *supra* note 17, at 344 (quoting a reconstruction of the speech from Madison's notes (Oct. 1784), *in* 1 WILLIAM C. RIVES, HISTORY OF THE LIFE AND TIMES OF MADISON 625 (1866)).

472. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 183, 188.

been that Religion could not be preserved without the support of [Government] nor [Government] be supported [without] an established religion[—]that there must be at least an alliance of some sort between them.

It remained for North America to bring the great and interesting subject to a fair, and finally to a decisive test.

In . . . [the colonies of Rhode Island, New Jersey, Pennsylvania,] Delaware, [and] the greater part of [New York] there were no religious Establishments; the support of Religion being left to the voluntary associations [and] contributions of individuals

. . . .

. . . [T]he New England States have . . . advanced toward the prevailing example; and without any evidence of disadvantages either to Religion or good Government.⁴⁷³

The "old error," that of "alliance or coalition between Government and Religion," has a "corrupting influence on both the parties, [and] . . . the danger cannot be too carefully guarded against."⁴⁷⁴ The goal must be a "perfect separation between ecclesiastical and civil matters."⁴⁷⁵ Madison conducted that "religion and Government will both exist in greater purity, the less

473. Letter from James Madison to Rev. Adams (1832), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 484, 485-86. In another private letter, he wrote: The settled opinion here is that religion is essentially distinct from civil government, and exempt from its cognizance, and that a connection between them is injurious to both Prior to the Revolution, the Episcopal Church was established by law in this State. On the Declaration of Independence it was left, with all other sects, to a self-support. And no doubt exists that there is much more religion among us now than there ever was before This proves rather more than that the law is not necessary to the support of religion.

Letter from James Madison to Edward Everett (1823), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 321, at 305, 307-08; *see also* Letter from James Madison to Robert Walsh (Mar. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 321, at 121, 125. ("It was the universal opinion of the century preceding the last, that civil Government could not stand without the prop of a religious establishment, and that the Christian religion itself would perish if not supported by a legal provision for its clergy. The experience of Virginia conspicuously corroborates the disproof of both opinions.")

474. Letter from James Madison to Edward Livingston (July 10, 1822) in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 321, at 275.

475. *Id.*

they are mixed together."⁴⁷⁶

Others launched similar attacks. Jefferson argued that Pennsylvania and New York "have long subsisted without any establishment at all. The experiment was new and doubtful when they made it. It has answered beyond conception. They flourish infinitely. Religion is well supported; of various kinds, indeed, but all good enough; all sufficient to preserve peace and order"⁴⁷⁷ A committee of delegates to the First Continental Congress wrote that establishments "may make hypocrites, but cannot create Christians. . . . That liberty, virtue, and public happiness can be supported without them, this flourishing province [of Pennsylvania] is a glorious testimony"⁴⁷⁸

Reformers did not attack the foundational belief of traditional proponents of establishments—that religion was necessary to sustain the moral fiber of society and the governmental institutions founded by that society.⁴⁷⁹ Rather, they attacked the assumption that state support of religion was constructive, rather than destructive, of religious faith and flourishing.⁴⁸⁰ For them, religious faith was a matter of individual conviction, and governmental efforts to support or enforce religion would only work to-

476. *Id.*

477. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, reprinted in THE PORTABLE THOMAS JEFFERSON, *supra* note 207, at 212; see also THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM, in THE PORTABLE THOMAS JEFFERSON, *supra* note 207, at 251, 252 (observing that state establishment of religion "tends . . . to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it").

478. SAMUEL DAVIS ET AL., MEMORIAL, quoted in HOVEY, *supra* note 271, at 200.

479. Isaac Backus, the Baptist dissenter who (at least rhetorically) opposed all forms of governmental aid to religion, is typical in this regard. After condemning the intrusion of civil government into religious affairs, he nonetheless affirms "[t]hat Christianity is essentially necessary to the good order of civil society is a certain truth." 2 ISAAC BACKUS, A HISTORY OF NEW ENGLAND WITH PARTICULAR REFERENCE TO THE DENOMINATION OF CHRISTIANS CALLED BAPTISTS 294 (David Weston ed., 1969).

480. Madison framed the question thus: "[N]ot is Religion necessary, but are Religious Establishments necessary for Religion?" 1 STOKES, *supra* note 17, at 389; see also CURRY, *supra* note 202, at 219-20 (discussing the views of those who opposed governmental aid to religious institutions); MARK DE W. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY *passim* (1965) (arguing that the predominant fear of religionists during the Founding Era was the protection of the religious "garden" from the "wilderness" of the state).

ward its destruction.⁴⁸¹

The existence of state aid to religious institutions raised, for reformers, the distinct and overwhelming danger of the aggregation of governmental and religious institutional power. This "establishment of religion by government" was, in their view, the inevitable historical product of governmental aid to religion and the consequent involvement of religious and governmental institutions in each other's affairs. Madison wrote that

[i]n the Papal System, Government and Religion are in a manner consolidated [and] that is found to be the worst of [Governments].

. . . [T]he legal establishment of a particular religion . . . makes [that religion] a part of the Political and Civil organization and . . . few . . . will maintain that the system has been favorable either to Religion or the [Government].⁴⁸²

As President of the United States, Madison vetoed an attempt by Congress to incorporate the Episcopal Church in the District of Columbia.⁴⁸³ This bill, which prescribed the organization and governance of the church, was opposed by Madison on grounds that echo modern entanglement doctrine. The bill, Madison wrote, violated the Establishment Clause and the "essential distinction between civil and religious functions." "This particular church . . . would . . . be a religious establishment by law, a legal force and sanction being given to certain articles in its constitution and administration."⁴⁸⁴ The provisions in the bill granting the church authority to provide for the support of the poor was likewise dangerous, because they "would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty."⁴⁸⁵ Thomas Paine's

481. See CURRY, *supra* note 202, at 138.

482. Letter from James Madison to Rev. Adams (1832), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 484, 485.

483. James Madison, Veto Message (Feb. 21, 1811), in THE COMPLETE MADISON, *supra* note 283, at 307.

484. *Id.*

485. *Id.*; see also HOWE, *supra* note 480, at 44-45 (discussing Madison's opposition to the incorporation bill). A petition by the Episcopal Church to the Virginia Assembly to allow the Church's incorporation in Virginia was condemned as "an express

description was succinct: the legal connection of the church with the state creates "a sort of mule-animal, capable only of destroying, . . . called *The Church established by Law*."⁴⁸⁶

In addition, reformers openly challenged the traditional belief that the state could give aid to religious institutions while simultaneously precluding their involvement in the structures of political power. Reformers viewed the traditionalists' belief that establishments could be a one-way street—with state aid to religious institutions; but no reciprocal involvement of religious institutions in the affairs of government—as a painful and dangerous naivete. They ridiculed the expectation that religious institutions, whose financial welfare and, perhaps, very existence depended upon the beneficence of civil government and its laws, would remain separate and apart from the affairs of government. Madison wrote that the established clergy "are a numerous and powerful body . . . and will naturally employ all their art [and] Interest to depress their rising Adversaries; for such they must consider dissenters who rob them of the good will of the people and may in time endanger their livings [and] security."⁴⁸⁷ Where there is support of religious institutions by government, there will be a

tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them best guarded [against] by an entire abstinence of the [Government] from interference in any way whatever, beyond the necessity of preserving public order, [and] protecting each sect [against] trespasses on its legal rights by others.⁴⁸⁸

Fear of church-state merger also proceeded on a more subtle basis: that the establishment of religion by government threatened the equality of all religious sects in the eyes of the law. Reformers vehemently believed that "no man or class of men,

attempt to draw the State into an illicit connexion & commerce with them." Letter from John B. Smith to James Madison (June 21, 1784), in 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 212, 214 n.1.

486. PAINE, *supra* note 334, at 67.

487. Letter from James Madison to William Bradford (Apr. 1, 1774), in 1 THE PAPERS OF JAMES MADISON, *supra* note 210, at 111, 112.

488. Letter from James Madison to Rev. Adams (1832), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 484, 487.

ought, on account of religion to be invested with peculiar emoluments or privileges, nor be subjected to any penalties or disabilities;⁴⁸⁹ and that the involvement of government in the making of distinctions between citizens on this basis violated required neutrality.⁴⁹⁰ By clear implication, the existence of religious establishments also attempted to influence religious exercise and practice in violation of rights of conscience.⁴⁹¹

Principles of government neutrality and equality presented a difficult theoretical question: whether they extended to distinctions between religion and nonreligion, or only to distinctions among competing religious groups. For some, these principles clearly protected the atheist as well as those who professed some kind of religious belief.⁴⁹² For others, this was clearly not the

489. JAMES MADISON, VIRGINIA JOURNAL (1776), reprinted in "IN GOD WE TRUST," *supra* note 217, at 301; see also THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1777), reprinted in THE PORTABLE THOMAS JEFFERSON, *supra* note 207, at 251, 253 (proposing that religious beliefs of individuals "shall in no wise diminish, enlarge, or affect their civil capacities"); JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 183, 186 (arguing that an establishment would violate basic principles of equality).

490. Madison wrote in a private letter:

Among the features peculiar to the political system of the United States is the perfect equality of rights which it secures to every religious sect. . . . Equal laws, protecting equal rights, are found . . . the best guarantee of loyalty and love of country; as well as best calculated to cherish that mutual respect and good will among citizens of every religious denomination which are necessary to social harmony, and most favorable to the advancement of truth. The account you give of the Jews of your congregation brings them fully within the scope of these observations.

Letter from James Madison to Dr. de la Motta (Aug., 1820), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 321, at 178, 179.

491. See, e.g., CURRY, *supra* note 202, at 202; JAMES MADISON, VIRGINIA JOURNAL, reprinted in "IN GOD WE TRUST," *supra* note 217, at 301. For this reason, opposition to tax support of religious institutions was often framed as a free exercise rather than an establishment issue. See CURRY, *supra* note 202, at 216-17.

492. See, e.g., THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 176, at 67 (describing his intention that the Virginia Bill Establishing Religious Freedom protect "the Jew and the Gentile, the Christian and the Mahometan, the Hindoo, and the infidel of every denomination"); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 269, 271-72 (criticizing those who feared an extension of the "rights of conscience" to "Jews Turks & infidels"). Madison implied the extension of religious freedom to nonbelievers in his *Memorial and*

case.⁴⁹³ The debate, however, became one largely of rhetoric, rather than substance, since the focus for dissenters was governmental acts that privileged some at the expense of others or that otherwise threatened the sanctity of conscience. By focusing on the effects of positive acts of government, a broad consensus was achieved, since any attempted religious establishment inevitably disadvantaged other religious groups as well as those who professed no religion.⁴⁹⁴

Reformers acknowledged the difficulties inherent in the concept of institutional separation of church and state. Madison wrote that "I must admit . . . that it may not be easy, in every possible case, to trace the line of separation between the rights

Remonstrance Against Religious Assessments, where he wrote that "[w]hilst we assert for ourselves a freedom to embrace . . . the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us." JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 183, 186; see also Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), in 8 THE PAPERS OF JAMES MADISON, *supra* note 210, at 149, 149-50 ("I fully agree with the presbyterians, that true freedom embraces the Mahomitan and the Gentoo as well as the Christian religion. And upon this liberal ground I hope our Assembly will conduct themselves."). This liberal spirit did not, however, dissuade Lee from advocating a general tax assessment for religion: "[T]he experience of all times shows Religion to be the guardian of morals—and he must be a very inattentive observer in our Country, who does not see that avarice is accomplishing the destruction of religion, for want of a legal obligation to contribute something to its support." *Id.* at 149.

493. See, e.g., Statement by Rep. Huntington, 1 ANNALS OF CONG., *supra* note 380, at 730-31 (Aug. 15, 1789) (He understood that what was to become the First Amendment should "be made in such a way as to secure the rights of conscience, and [the] free exercise of the rights of religion, but not to patronize those who professed no religion at all."); see also CURRY, *supra* note 202, at 78-79 (arguing that colonial writers rarely considered the possibility that religious freedom might include the right not to believe in Christian principles); cf. JOHN LOCKE, A LETTER CONCERNING TOLERATION, BEING A TRANSLATION OF THE EPISTOLA DE TOLERANTIA, reprinted in 6 THE WORKS OF JOHN LOCKE 1, 47 (1823) ("Lastly, Those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist.").

494. This approach was apparent, for instance, in Madison's *Memorial and Remonstrance Against Religious Assessments*, where he argued that the theory which permits general assessment for Christianity could as easily support the establishment of a particular sect of Christians, to the exclusion of other sects. Such a bill, he wrote, "violates that equality which ought to be the basis of every law." JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 2 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 183, 186.

of Religion [and] the civil authority with such distinctness as to avoid collisions [and] doubts on unessential points."⁴⁹⁵ Even those who favored the general theory of church-state separation disagreed about the particulars of its implementation. The Northwest Ordinance, as originally drafted, reserved one section of land in each township for religious purposes.⁴⁹⁶ Such general support of religion by government was advocated by many moderates.⁴⁹⁷ Madison, on the other hand, applauded the ordinance's demise, remarking, "[h]ow a regulation, so unjust in itself, so foreign to the Authority of [Congress,] so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a [congressional committee] is truly [a] matter of astonishment."⁴⁹⁸

Particular disagreement erupted on issues of governmental involvement in recommendations, proclamations, and exercises that were (at least arguably) religious in nature. Evangelical Protestant groups and others exhibited extreme concern over public calls for religious services.⁴⁹⁹ When the Continental Congress opened in September, 1774, Thomas Cushing suggested that daily sessions begin with prayer.⁵⁰⁰ Jay objected on the ground that the members represented too much diversity of religious opinion and belief to permit prayer selection in a manner fair to all.⁵⁰¹ Over this objection, and the objections of others, the practice was adopted.⁵⁰²

For government to *require* public religious activities would

495. Letter from James Madison to Rev. Adams (1832), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 484, 487.

496. See ERNST, *supra* note 183, at 56.

497. See *id.* at 56-57.

498. Letter from James Madison to James Monroe (May 29, 1785), in 8 THE PAPERS OF JAMES MADISON, *supra* note 210, at 285, 286. Madison later vetoed a bill passed by Congress that set aside a parcel of federal land for the use of a Baptist church. The bill, he wrote, "comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" James Madison, Veto Message (Feb. 28, 1811), in THE COMPLETE MADISON, *supra* note 283, at 308.

499. See HEIMERT, *supra* note 258, at 295.

500. See 1 STOKES, *supra* note 17, at 449.

501. *Id.*

502. See *id.* at 448-49.

clearly have violated church/state separation in the view of reformers; on the question of government recommendation, or government example, the responses were mixed. Writing about action that the President might take in response to disturbing events in France, Hamilton suggested that the President "recommend a day of fasting, humiliation, and prayer. The occasion renders it proper, and religious ideas will be useful."⁵⁰³ After the adoption of the Federal Constitution by the First Congress, a resolution was offered which requested that the President recommend to the people of the United States a day of thanksgiving and prayer.⁵⁰⁴ Objection was raised that "it is a business with which Congress has nothing to do; it is a religious matter, . . . proscribed to us."⁵⁰⁵ The resolution carried, and Washington issued the proclamation.⁵⁰⁶

Jefferson, when President of the United States, refused to follow suit. He explained:

I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority.⁵⁰⁷

The argument that such governmental edicts were merely

503. Letter from Alexander Hamilton to Timothy Pickering (Mar. 17, 1798), in 10 WORKS OF ALEXANDER HAMILTON, *supra* note 317, at 275, 276.

504. 1 STOKES, *supra* note 17, at 486.

505. *Id.* at 487 (quoting Statement of Thomas Tucker).

506. *Id.* This proclamation, drafted by Hamilton, recommended "a day of public thanksgiving and prayer . . . [to give] hearty thanks to the great Ruler of nations . . . [and] to diffuse and establish habits of sobriety, order, morality and piety . . . that so men may be happy and God glorified throughout the earth." Alexander Hamilton, Proclamation for a National Thanksgiving, in 8 WORKS OF ALEXANDER HAMILTON, *supra* note 317, at 120, 121-22.

507. Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 176, at 428, 428.

recommendatory, without civil or criminal sanction, failed to persuade him. "It must be meant, too," he wrote, "that this recommendation is to carry some authority, . . . perhaps in public opinion."⁵⁰⁸ This "change in the nature of the penalty [did not] make the recommendation less a *law* of conduct for those to whom it is directed."⁵⁰⁹ When reminded of existing state practices, which clearly included the issuance of such edicts, Jefferson stated only that "every one must act according to the dictates of his own reason, and mine tells me that . . . the President of the United States [has] no authority to direct the religious exercises of his Constituents."⁵¹⁰

In his Presidential years, Madison issued Thanksgiving Day proclamations, bowing to the power of tradition, the cultural expectations of the people, and the example of predecessors.⁵¹¹ He later wrote almost apologetically of his yielding on this issue, stressing that he was "always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory; . . . a day, on which all who thought proper might *unite* in consecrating it to religious purposes, according to their own faith and forms."⁵¹² He acknowledged that these proclamations deviated from his principles of separation of church and state, and "lost sight of the equality of *all* religious sects in the eye of the Constitution."⁵¹³ He apparently believed that any governmental foray into the realm of religious exercises, whether mandatory or hortatory, was impossible to reconcile with separationist and egalitarian principles; but respect for the expectations of others rendered resistance, at the time, impossible.

Similar conflicts surrounded the issue of the appointment of federal chaplains. Congressional chaplains were first established by Act of Congress on September 22, 1789.⁵¹⁴ In 1808, Jefferson signed a law providing for the appointment of a chaplain for

508. *Id.* at 428-29.

509. *Id.* at 429.

510. *Id.* at 429-30.

511. See PFEFFER, *supra* note 199, at 224.

512. Letter from James Madison to Edward Livingston (July 10, 1822), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 321, at 273, 275.

513. *Id.* at 274-75.

514. 1 STOKES, *supra* note 17, at 457.

each brigade of the Army, and Madison signed an act reauthorizing the appointment of Congressional chaplains in 1816.⁵¹⁵ In his later writing, Madison repudiated this practice:

Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?

In strictness the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment . . . ?

The establishment of the chaplainship [in Congress] is a palpable violation of equal rights, as well as of Constitutional principles: The tenets of the chaplains elected [by the majority] shut the door of worship [against] the members whose creeds [and] consciences forbid a participation in that of the majority. . . .

Were the establishment to be tried by its fruits, are not the daily devotions conducted by these legal Ecclesiastics, already degenerating into a scanty attendance, and a tiresome formality?

Better also to disarm . . . the precedent of Chaplainships for the army and navy, than erect them into a political authority in matters of religion. The object of this establishment is seducing; the motive to it is laudable. But is it not safer to adhere to a right principle, and trust to its consequences, than confide in the reasoning . . . in favor of a wrong one. . . . If the spirit of armies be devout, the spirit out of the armies will never be less so . . . and if such be not the spirit of armies, the official services of their Teachers are not likely to produce it.⁵¹⁶

These views were shared by Protestant religious leaders, such as

515. MCCLELLAN, *supra* note 495, at 141-42.

516. Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 558-59 (1946).

John Leland,⁵¹⁷ they apparently were not shared by many others of the age.⁵¹⁸

Objections to the use of religion by government were grounded in three powerful ideas: that religion must be, and is, wholly exempt from the cognizance of government,⁵¹⁹ that governmental involvement in religious activities destroys the requirement of government neutrality among religious sects,⁵²⁰ and that any institutional merger of church and state must be avoided.⁵²¹ Despite these concerns, routine governmental papers were replete with mention of "God," "Nature's God," "Providence," and other religious references.⁵²² Religious references on the Great Seal of the United States were apparently deemed desirable by conservatives and reformers alike. When proposed designs were solicited, Franklin suggested an image of Moses lifting up his wand and dividing the Red Sea, with the motto "Rebellion to tyrants in obedience to God," and Jefferson proposed the children of Israel in the wilderness "led by a cloud by day and a

517. See JOHN LELAND, *THE VIRGINIA CHRONICLE*, reprinted in *THE WRITINGS OF JOHN LELAND* 119 (L.F. Greene ed. 1845) ("Under this head, I shall also take notice of one thing, which appears to me unconstitutional, inconsistent with religious liberty, and unnecessary in itself; I mean the paying of the chaplains of the Civil and Military departments out of the public treasury. . . . If legislatures choose to have a Chaplain, for Heaven's sake, let them pay him by contributions, and not out of the public chest.").

518. See CURRY, *supra* note 202, at 219.

519. See, e.g., Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), in 11 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 428, 429 ("I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines . . . Every religious society has a right to determine [these] for itself . . . , according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it."); see also JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS*, reprinted in 2 *THE WRITINGS OF JAMES MADISON*, *supra* note 265, at 183, 185 ("Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe Religion is wholly exempt from [the] cognizance [of government].").

520. See, e.g., JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS*, reprinted in 2 *THE WRITINGS OF JAMES MADISON*, *supra* note 265, at 183, 186.

521. See, e.g., Letter from Thomas Jefferson to Levi Lincoln (Jan. 1, 1802), in 10 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 305, 305 (observing that proclamation of fastings and thanksgivings encourages "alliance between Church and State").

522. See PFEFFER, *supra* note 199, at 119.

pillar of fire by night."⁵²³ Reformers tolerated such references, apparently because they were not believed to implicate core concerns.

Occasionally, attempts to achieve institutional separation raised questions of the unfair treatment of the religious. Under colonial laws and new state charters, clergy often were incapacitated from holding public office on the theory that to allow them to do so would create a potentially dangerous alliance between church and state.⁵²⁴ Jefferson initially supported such exclusions and included a provision prohibiting office holding by "Ministers of the Gospel" in his draft of a Constitution for Virginia.⁵²⁵ He later reversed his position, on the ground that no realistic danger of church-state merger was presented. Although such prohibitions might have been necessary in prior times, by the turn of the century the clergy "seem to have relinquished all pretension to privilege" and should, therefore, possess the same political rights as other citizens.⁵²⁶

The role of religious teaching and studies in public universities presented similar conflicts. For Madison, the teaching of Christianity in a "university established by law, and at the common expense," was a flagrant violation of free exercise and anti-establishment principles.⁵²⁷ For Jefferson, the importance of

523. 1 STOKES, *supra* note 17, at 467-68. The final version included the "Eye of Providence." *Id.*

524. *See supra* notes 466-70 and accompanying text.

525. Thomas Jefferson, Draft of a Constitution for Virginia, in 6 THE PAPERS OF THOMAS JEFFERSON 294, 297 (Julian P. Boyd ed., 1952); *see also* HOWE, *supra* note 480, at 61-62 (comparing the views of Jefferson and Madison). Madison challenged this practice on the ground that office holding was a civil liberty and its denial to clergy was the denial of a civil right. He wrote: "Does not the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it [not] violate another article of the plan itself which exempts religion from the cognizance of the Civil power?" James Madison, Observations on the "Draught of a Constitution for Virginia" (Oct., 1788), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 265, at 284, 288.

526. Letter from Thomas Jefferson to Jeremiah Moor (Aug. 14, 1800), in 7 THE WRITINGS OF THOMAS JEFFERSON 453, 455 (Paul L. Ford ed., 1904).

527. Letter from James Madison to Edward Everett (1823), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 321, at 305, 307-08. Madison's views of church-state institutional separation were often more extreme than others of this age. For instance, he opposed a proposal to exempt churches from state taxation on

religious studies and the need for their equal treatment with other disciplines led to his proposal of a complex plan for the University of Virginia. He proposed that the four major religious denominations be invited to

establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend lectures there, and have the free use of our library, and every other accommodation we can give them; preserving, however, their independence of us and of each other.⁵²⁸

His enthusiasm about the results of the mixing of sects, which "shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality,"⁵²⁹ apparently blinded him to the obvious problems inherent in the choice of particular religious groups for this accommodation.

F. Summary and Conclusion

The historical record is far from unambiguous. Political spokesmen, traditional religionists, and the leaders of emerging dissident religious groups often had radically different world views and radically different images of the existing social and governmental order. Differences pervaded the goals, motivations, and understandings of language of the participants in the great dialogue.

Although these differences existed, various strains of congruence among reformers can be found. Religiously-based truths, however understood, were widely believed to be the foundation of the ultimate moral principles on which civil society and republican governmental systems depended. Natural law, natural rights, and similar concepts were the articulations of what was believed to be man's apprehension of the transcendent truths of

the ground that it was an attempted "encroachment by Ecclesiastical Bodies" into alliance with government. Fleet, *supra* note 516, at 555. Few others apparently shared this view.

528. Letter from Thomas Jefferson to Thomas Cooper (Nov. 2, 1822), in 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 176, at 403, 405.

529. *Id.*

the universal natural order. Calls for "liberty," "justice," "truth," "equality," and so on had extraordinarily cohesive power, whatever differences their makers intended.

Even those who clearly fell within the Enlightenment tradition assumed the existence of a Provident natural order and the workings of transcendent or religious beliefs and ideals in private and public life. The explosion of scientific discovery and social scientific thinking in the eighteenth century led not to an abandonment of religion, but to attempts to harmonize religious concepts with scientific discoveries and emerging beliefs in a rational, self-sustaining natural order.⁵³⁰ Jefferson wrote to Adams that scientific discoveries reinforced "the necessity of a superintending power to maintain the Universe in it's course and order."⁵³¹ James Turner, in a detailed and exhaustive study of the time, wrote that in this era, "disbelief in God remained scarcely more plausible than disbelief in gravity."⁵³² The task that the articulate spokesmen of this era set for themselves was not the eradication of the religious from public life, but the development of ways in which the avowedly religious nature of the people could be fostered while protecting religious and governmental institutions from destruction, each by the other.

The implementation of these ideas as part of a governmental plan was the subject of great conflict. As ideas of reform gained

530. See TURNER, *supra* note 298, at 35-72.

531. Letter from Thomas Jefferson to John Adams (Apr. 11, 1823), in THE ADAMS-JEFFERSON LETTERS, *supra* note 281, at 591, 592.

532. TURNER, *supra* note 298, at 44. He wrote:

The Enlightenment spawned much religious doubt and some atheistic speculation, but even in its radical variants, eighteenth-century culture could scarcely support unbelief as a really viable option. . . . The common inclination among later historians to see rejection of the Christian God as a halfway house to unbelief in any God misunderstands both Deism and the Enlightenment. The "natural religion" favored by the more adventurous Enlightenment thinkers constituted a legitimate if thin-blooded form of theism, not a road to unbelief. Only much later, in indirect ways and under very different circumstances, did it—could it—contribute to the eventual emergence of a widespread and enduring disbelief in God. Unbelief required too great a divorce from reality, as understood during the Enlightenment, to be either palatable or plausible.

Id. at 46.

momentum, they crystallized around a core concept: the call for freedom of conscience. Freedom of conscience encompassed ideas of individual free inquiry and private judgment. It was used to describe the process by which many believed that religious belief and conviction were formed. Its protection was vehemently advocated not only as a matter of religious practice and obligation, but also as a matter of grave governmental concern: it was believed that a republic could not survive without the ability of citizens to freely reason and, as the result of that process, to apprehend the moral consensus necessary to sustain civil society and republican government.

The protection of freedom of conscience lay at the base of two great and emerging principles: free exercise of religion and the destruction of religious establishments by government. Neither was a simple concept with simple acclaim and obvious application. The understandings of these principles, and how they should be implemented to protect the deeper goals that they represented, were the subjects of deep disagreements. The principles were not neat or exclusive, with clearly-defined boundaries into which human activities could be sorted.

Solutions to various problems, however, were motivated by the same concerns. Free religious exercise was grounded in the principle of freedom of conscience. The power of this principle is seen not only in the ubiquity of calls for freedom of conscience and religious expression, but also in the almost unthinkable political character of explicit advocacy of state-imposed orthodoxy in matters of religious exercise or belief. There was nearly universal agreement that free religious exercise included freedom to pursue religious activities and worship, although the extension of these rights to disfavored religious groups often was denied in principle and in practice. Despite such inconsistencies, a consensus emerged that free religious worship must include the ability to erect houses of worship of the design desired; the freedom to attend, or not to attend, religious services; and the freedom of religious institutions to control their doctrines, disciplines, and exercises.

Although the protection of religious exercise was broad, the needs of civil society and civil order demanded that it not be absolute. Limitations on religious exercise and expression were

usually expressed in terms of preservation of the peace and safety of the state and the protection of the reciprocal rights of others. Laws that attempted, through indirection, to enforce particular religious creeds (such as prohibitions against profanity, blasphemy, and atheism, and the use of test oaths for public office) engendered particular opposition from reformers. Reformers navigated between the shoals of conflicting societal and individual needs by offering the following resolution: that the expression of conscience, or free religious exercise, must be protected unless equal liberty or the peace and safety essential to the state was manifestly endangered.

Similarly, indirect attempts by government to enforce or to promote particular beliefs—through the use of test oaths for public office, public taxation for religious organizations, and so on—increasingly were viewed in hostile terms. Such religious establishments by government were seen as potentially corrupting on various levels: to individuals, who would be forced to act in ways contrary to the dictates of conscience in order to obtain public power or benefits; to religious institutions, which would lose their spiritual and actual autonomy in the scramble for governmental largesse and political power; and to government, which would, through alliance or merger with religious institutions, lose its ability to respect and protect the needs of all citizens in accordance with fundamental concepts of equality.

The importance of religious belief to the moral foundations of society and government, which was asserted by those who supported religious establishments, was not denied by those who opposed them. Although religious institutions were seen as necessary expressions of religious freedom, and as valuable contributors to the inculcation of moral values, their merger with government was believed to hold the potential for intellectual tyranny and the destruction of the very freedom of conscience that their existence represented. The question was how to preserve the benevolent function of religious institutions without fostering an aggregation of governmental and religious institutional power. In early colonial days, many believed that this balance could be accomplished through state support of religious institutions in a myriad of ways. By the time of the Constitutional Convention of 1787, and the confrontation of these issues

in the context of a national polity, a consensus was clearly emerging that it could not. Conditions of religious diversity, and persistent calls for the general sanctity of individual belief, rendered existing mergers of religious institutions with government increasingly untenable.

The implementation of these principles was uneven and fraught with inconsistency, even among the influential reformers of the age. Although schemes that forced individuals to pay toward the maintenance of others' religious institutions were widely condemned by the time of the Revolution, schemes that merely forced individuals to pay toward the maintenance of their own religious institutions were supported, at least lukewarmly, by many of the articulate spokesmen of this era. Only as time progressed, and such establishments were increasingly opposed on free conscience and free exercise grounds, were inroads against them made as well. Historical practices, political pressures, and unquestioned belief in the positive role of religion in society and in government led to many unusual configurations. Announcements of principles of equality coexisted with religious test oaths in state constitutions. Reformers, working from the same principles, both opposed and supported the issuance of Thanksgiving Day proclamations and the teaching of Christianity at a publicly-financed university. Although general principles were clear, their implementation often was not.

Although inconsistencies can certainly be found, the thrust of the reformers' message was clear. Moreover, the difficulty in determining the proper implementation of principles of church-state separation was rooted in a deeper reality: that the religious impulse and American culture were deeply intertwined. The prevailing view throughout this era, shared by traditionalists and reformers alike, was that religion was an accepted and necessary part of human expression and communal life. The question was how to end direct and indirect governmental compulsion in matters of conscience, while maintaining the social structures and the fabric of shared values believed to be necessary for social cohesion and free government.

IV. AN ALTERNATIVE APPROACH TO FIRST AMENDMENT GUARANTEES

A. *Introduction*

I have argued that during the Founding Era, a consensus emerged among reformers for the following propositions. It was believed that religion (in the sense of the search for transcendent, moral principles) was a vital force in the lives of individuals and a necessary part of the foundation of free, republican government. Free inquiry, or freedom of conscience, was necessary for this apprehension of religious or "transcendent" truths to occur. The protection of conscience was imperative. It was to be accomplished by explicit protection of the expressions of conscience (religious free exercise) and by prohibition of the aggregation of governmental and religious institutional power (the establishment of religion by government).

The Supreme Court's approach to religious questions has been altogether different. The Court has attempted to separate the religious and the secular, in individual and collective life, and has attempted to use that line of demarcation as the foundational principle for First Amendment religious guarantees. If a nonseparationist approach (such as what I term the "historical" approach) were used—one that *rejects* the separation of the religious and the secular as the operational principle, and substitutes, instead, the protection of individual conscience—what would result? What would be the shape, content, and limitations of First Amendment guarantees?

In this Section, I will consider the implications of a nonseparationist, historical approach for First Amendment jurisprudence. Rejection of the separation of the religious and the secular, and focus (instead) on the protection of individual conscience, would have important implications for the breadth, importance, and presumptions of protected free exercise. Implications for Establishment Clause jurisprudence would be even more profound. If focus in these cases were shifted from hostility to the religious in public life to the enforcement of religious and governmental *institutional* separation, the Court's existing approach to these cases would be fundamentally altered. Many state actions now sanctioned would fail, and many state actions

now condemned would be permitted. Finally, there are the implications of the historical approach for what may be the most intriguing question in First Amendment jurisprudence: the apparent irreconcilability of the Free Exercise and Establishment Clauses. Under the historical approach, is the irreconcilable, reconciled?

B. Free Religious Exercise

The Supreme Court currently approaches free exercise cases in the following fashion. First, the religious nature of the claim is considered. In practice, this investigation generally involves a separation of the religious from the philosophical, a presumptively nonprotected category.⁵³³ If the claim involved is a religious one, the next question is whether the state action has, as its object, the "burdening" of religion—such an object being invalid, in the Court's view, under the Free Exercise Clause. If the claim is religious, and the state action "neutral," the remaining tests—belief vs. action, "centrality" of belief, and the "compelling" nature of the governmental interest—are attempts to assign importance, and protection, to the conflicting interests involved.⁵³⁴

The Court's threshold attempt to separate religious from philosophical beliefs, with protection accorded to the former and denied to the latter, has proven increasingly problematic as less traditional, nontheistic beliefs have provided the basis for free exercise claims. This attempt has also conflicted with the Court's theoretical (and practical) recognition that both the nature of an asserted belief and the question of an individual's adherence to that belief must be left to individual determination. Under the Court's approach, (unprotected) philosophical beliefs must be separated from (protected) religious beliefs; but the difficulties of this task are so great that the Court's analyses have tended to founder at the outset.

The historical approach would change the threshold question asked. Under this approach, the issues of the Clause's scope or

533. See *supra* notes 20-25 and accompanying text. Establishment Clause claims have involved the same (albeit often unspoken) inquiry.

534. See *supra* notes 33-63 and accompanying text.

coverage would turn less on the *nature* of the asserted belief than on the protection of the *process* of individual belief formation. Freedom of conscience—and the deep reasons for its protection—would provide the outer limits of the Clause. The critical question would not be whether an inquiry involves “religious” or “philosophical” issues or answers, but whether it involves the exercise of free human reason, judgment, and understanding “about . . . ultimate matters of belief, of meaning, [and] of value.”⁵³⁵ Attempted distinctions between the religious and the philosophical—a hopeless enterprise, as the Court has all but conceded—would no longer be the focus of protection.

Regaining conscience as the focus of protection would obviously not eliminate all definitional issues. The need for some understanding of this new test would remain. “Freedom of conscience” had definite meaning in the Founding Era; it was assumed to involve individual determination of answers to fundamental questions of human existence, including the determination of “religious” or transcendent truths.⁵³⁶ Such ideas are far from precise; the problem of individual relativity—that one person’s “fundamental questions” or “transcendent truths” may not be those of another—would remain. However, focus on the *process* of conscience, and on the *purposes* served by its freedom, might well yield a more articulable understanding of the scope of free exercise protection than current practice has done.

Use of the historical approach would also ameliorate a deeper problem. Problems in distinguishing the religious from the secular are an inherent part of any scheme of First Amendment interpretation. They are far more critical, however, for a scheme that depends, for its foundational structure, upon analytical and spheric religious/secular separation. If an intertwining of religious and secular is accepted, as a matter of First Amendment analysis, some indeterminacy in the definition of religion may be untidy, but manageable. If, on the other hand, the religious and the secular must be separated rigidly, and separation is depen-

535. MILLER, *supra* note 9, at 343; cf. RICHARDS, TOLERATION, *supra* note 333, at 97, 137-44 (arguing that the Free Exercise Clause, and the freedom of conscience that it protects, should broadly immunize theistic and nontheistic beliefs, powers of rationality and reasonableness, from state coercion).

536. See *supra* notes 270-313 and accompanying text.

dent upon a definition that is somewhat nebulous at best, there is a festering difficulty at the root of the entire jurisprudential scheme. The historical understanding does not eliminate all definitional issues; but it does render their inherent uncertainty far less pivotal in the basic understanding of First Amendment protections and prohibitions.

Under the historical approach, the next step in the Court's analysis—that laws that intend to burden religion are, by this reason alone, invalid—would have no force. This inquiry, like “subjective” inquiries in establishment cases,⁵³⁷ has no place in the historical approach. Rather, the question would be whether, as an *actual* matter, the law impairs the claimant's freedom of conscience (exercise of religion). This function, or effect, would be determinative. The “object” of the law, if it has no such effect, would be irrelevant.

Existing tests that assign importance (and protection) to conflicting claims would also change. The distinction between religious belief and religiously-motivated action, which has been repeatedly invoked by the Court in support of its decisions, is alien to the historical approach. In the Founding Era, religious beliefs, and their expression in a myriad of ways, were assumed to be an integral part of individual and communal life.⁵³⁸ Freedom—to object, to dissent, to express religious and conscientious belief—clearly was accepted and protected. Different degrees of protection for religious belief and religious action would have been seen as essentially meaningless, since the idea of belief without action was not seen as a viable choice. Even those governmental acts that seemed to directly concern belief, such as prescribed creeds, test oaths for public office, and so on, were seen in terms of coercion of action: acts of worship, testifying as to one's beliefs, implementing one's religious creeds in private and public life.

If the historical approach were used, the question of protection would devolve into what has essentially been the final part of the Supreme Court's test: whether the state's asserted restriction of religious free exercise or the expression of conscience is

537. See *supra* notes 68-88 and accompanying text.

538. See *supra* notes 376-421 and accompanying text.

supported by something akin to a compelling governmental interest.⁵³⁹ In particular terms, the test would be whether the governmental action in question serves to protect the state from a manifest danger or to protect the reciprocal rights of others. Although this test might not seem to be a substantial change as a rhetorical matter, the weight assigned to competing interests within this test would be profoundly altered. The concern with religious/secular separation that I argue to be the animating principle in the Supreme Court's decisions—the approval of those claims that accept the Court's conception of separation and the denial of those that do not—would be completely incomprehensible, indeed, illicit, under the historical approach. In the absence of separationist concerns, findings of “compelling” governmental interests in the denial of exemptions from military service,⁵⁴⁰ from participation in the Social Security system,⁵⁴¹ and from assignment of Social Security numbers,⁵⁴² might well reach different outcomes. Similarly, the assumption that protection of “neutral” laws that do not “coerce” individual action must trump competing religious interests⁵⁴³ would have no place under the historical approach.⁵⁴⁴ All laws that restrict religious free exercise or the expression of conscience would be subject to equal scrutiny.

Balances struck in free exercise cases would also be altered by enhanced recognition of the societal or collective value inherent in free exercise claims. Although the Court's opinions have been characterized by stock recitations of the importance of free exercise to the religious claimant involved,⁵⁴⁵ there is no recogni-

539. See *supra* notes 41-65 and accompanying text.

540. See *Gillette v. United States*, 401 U.S. 437 (1971).

541. See *United States v. Lee*, 455 U.S. 252 (1982).

542. See *Bowen v. Roy*, 476 U.S. 693 (1986).

543. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Employment Div. v. Smith*, 494 U.S. 872 (1990).

544. Cf. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (arguing that the framers of the First Amendment intended that there be religious exercise exemptions from otherwise neutral laws).

545. See, e.g., *Smith*, 494 U.S. at 877; *Lyng*, 485 U.S. at 453. In the majority opinions issued in two other recent free exercise cases, there are not even stock recitations: no discussion of the importance of free exercise to anyone (including the claimant) appears. See *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Bowen*, 476 U.S. at 693.

tion that protection of free exercise serves any socially useful function or has any importance to the process of government. As a result, the Court has viewed free exercise claims as individually-defined, arbitrary interferences with communal desires and norms. When these arbitrary, individual claims (of no societal value) are weighed against the claims of government (which, by definition, reflect the collective will), the result is predictable: the latter must prevail. This analytical process reached its culmination in the recent collapse of the compelling interest test in *Lyng*⁵⁴⁶ and *Smith*.⁵⁴⁷ Since, in those cases, the only recognized interests of collective importance were those represented by government, accommodation of free exercise claims might as well be left "to the political process."⁵⁴⁸ Indeed, the absence of any perceived societal value in religious free exercise is reflected in the Court's articulation of the compelling governmental interest test itself. Although an interest is "compelling" only in the context of other interests, that context, as articulated by the Court, has been increasingly limited to the interests of government.⁵⁴⁹

Use of the historical approach would force recognition and articulation of the societal and governmental interests that underlie free exercise claims. Because freedom of conscience under the historical approach has both individual *and* collective value, societal interests in these claims must be considered in evaluating the impact of governmental action. Claims for freedom of conscience (or religious free exercise) cannot be seen simply as individually-defined and arbitrary annoyances—"luxur[ies]" that our society "cannot afford;"⁵⁵⁰ they present core, fundamental values, on which a free society and free government depend.

546. 485 U.S. 439 (1988).

547. 494 U.S. 872 (1990).

548. *Id.* at 890; see also *Lyng*, 485 U.S. at 452.

549. See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989) (compelling interest in maintaining a "sound tax system" is compared to the governmental interest in an exemption-free Social Security System) (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)); *Smith*, 494 U.S. at 879-84 (comparing the governmental interest in "generally applicable criminal law[s]" to the governmental interests in Sunday closing laws, the integrity of the tax system, general governmental regulatory programs, and so on).

550. *Smith*, 494 U.S. at 888.

When weighing the competing interests involved in these cases, the calculation would be much more complex, with societal and governmental interests involved on both sides of the scale.

The fundamental differences in orientation that this approach involves are evident when it is compared to the "exceptions" approach to free exercise. In *The Origins and Historical Understanding of Free Exercise of Religion*,⁵⁵¹ Michael McConnell challenges the *Lyng* and *Smith* decisions and argues that articulate spokesmen of the Founding Era anticipated that religious exercise exceptions would be granted from otherwise neutral (secular) and generally applicable laws.⁵⁵² Although I am sympathetic with the thrust of his efforts, the approach that he describes is in fact the inverse of what I argue. Under an exceptions approach, one begins with neutral laws, and seeks exceptions for religious free exercise; under what I argue to have been the historical understanding, one begins with the assumption of freedom of conscience (or free religious exercise) and allows state interference only in those cases that present particular extremity or danger.

Arguably, the result will often be the same: under either understanding, the conflict is between religious exercise and community norms, with similar factors (compelling state interests) deciding the outcome. There is, however, a critical difference in the assumptions of each. Under what I argue to be the historical understanding, analysis begins with the primacy and strength of freedom of conscience; the state, which claims an exception to this value, must prove it. Under the "exceptions" approach, analysis begins with the primacy and legitimacy of state action; the individual, who claims an exception to *this* value, must prove it.

Although the Court often frames the "exceptions" approach to the contrary, this approach assumes the broad, collective power of "otherwise neutral" state laws, and the absence of any perceived societal value or function in free exercise claims. As a result, the legitimacy of state action is presumed, with the religious claimant left to prove otherwise. The march toward *Smith*

551. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

552. *Id.* at 1453-55.

and *Lyng* was not, in other words, accidental. It inhered in an approach that identifies state laws with collective values and collective power and that leaves the free exercise claimant to argue for an exception, alone.

Admittedly, the use of the historical approach would make the adjudication of free exercise claims more difficult. The approach in *Lyng* and *Smith*—that the bulk of free exercise claims (being only of an individually valued nature) simply are outweighed by the collective will, asserted in any neutral law of general application—is certainly a simple one. However, its assumption that free exercise is a separate, “private” matter, which is protected only when it does not contravene the routine affairs of government, relegates religiosity and the freedom of conscience on which it is based to a role of extreme peripherality. In the Founding Era, it was assumed that freedom of conscience and its expression were the fundamental values from which all else sprang. In only the most extreme circumstances was suppression justified.⁵⁵³ From this beginning, we have moved to a point, in *Lyng* and *Smith*, where any neutrally-framed law lies beyond free exercise challenge. Freedom of conscience and its expression have, indeed, been left to the grace of the sovereign. Perhaps, in our complacency, we have forgotten the bitter value of dissent.

C. *Freedom from Establishment of Religion by Government*

Under the traditional approach of the Supreme Court, establishment of religion by government is to be avoided by vigorous application of the tests set forth in *Lemon v. Kurtzman*.⁵⁵⁴ Under *Lemon*, in order for a law or governmental practice to withstand challenge on establishment grounds, it must have a secular purpose,⁵⁵⁵ it must have a primary effect that neither advances nor inhibits religion,⁵⁵⁶ and it must not foster “excessive government entanglement with religion.”⁵⁵⁷ Recently, the first two prongs of this test have been reframed in the terms of “en-

553. See *supra* notes 391-406 and accompanying text.

554. 403 U.S. 602 (1971).

555. *Id.* at 612.

556. *Id.* (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

557. *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

dorsement": the law or practice, to survive scrutiny, must not "convey a message that religion or a particular religious belief is favored or preferred."⁵⁵⁸ Implementation of these tests has involved the attempted separation of the religious and the secular within the individual, in society, and in government.⁵⁵⁹

The results of this approach have been operationally problematic and doctrinally incoherent. An analytical approach premised upon the separation of religious and secular motivations, uses, purposes, symbols, functions, and so on contradicts the enmeshment of the religious and the secular in all areas of human life. Indeed, recent challenges by fundamentalist Christian groups, who claim that the "establishment" of the majority's belief systems is no less violative of the Clause than the "establishment" of theirs, are the predictable (if uncomfortable) products of the Court's own approach.⁵⁶⁰

If this approach is compared with a nonseparationist, historical one, the differences are profound. Under the historical approach, the critical question in all cases is whether the governmental action or practice fosters an aggregation of governmental and religious institutional power. The existence of the religious in public life is important only to the extent that it answers this question. The fact that a particular governmental action is permeated by religious or anti-religious sentiments or values, or that it coincides with particular systems of belief, has no importance absent a further finding of dangerous church-state integration.

Historical concern with principles of equality and state neutrality would not change this result. These principles, while

558. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment).

In a very recent Establishment Clause case, the majority made no mention of the traditional *Lemon* test. See *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994). Members of the Court differed in their interpretations of this fact. Compare *id.* at 2494 (Blackmun, J., concurring) (noting "disagreement with any suggestion that today's decision signals a departure from the principles" of *Lemon*) with *id.* at 2500 (O'Connor, J., concurring in part and concurring in the judgment) (contending that the Court's opinion shows that "the slide away from *Lemon's* unitary approach is well under way").

559. See *supra* notes 74-77 and accompanying text.

560. See *supra* notes 150-75 and accompanying text.

clearly informing the historical approach, were not believed to be free-standing entities that should be used to eradicate the religious from public life.⁵⁶¹ Rather, principles of equality and state neutrality were understood to be a part of a greater objective—the prevention of institutional alliance of church and state. Governmental adoption of particular acts of religious worship, or financial support of religious institutions, threatened this objective and its included notion of equality; the enactment of laws from religious motives, or the coincidence of laws with religious belief systems, without more, did not. The latter was assumed to be a natural part of social and governmental life.⁵⁶²

How would these broad historical principles affect the Supreme Court's tests? Under the historical approach, the first, "secular purpose" prong of the *Lemon* test⁵⁶³—whether individual legislators or public officials are motivated by "religious" or "secular" values, beliefs, or ideals—would be either irrelevant to an Establishment Clause inquiry or itself a violation of constitutional guarantees. Such attempted religious/secular separation—believed in the Founding Era to be a complete impossibility⁵⁶⁴—would have no relevance to the question of whether particular governmental action fosters an aggregation of governmental and religious institutional power. Under the historical approach, it is assumed that government officials will implement the "fruits of conscience"; indeed, such implementation is assumed to be a necessary part of public life.⁵⁶⁵ The Court's current approach, which has involved the scouring of legislative records for evidence of religious bias or motive, would have been incomprehensible to those of the Founding Era. It would have been seen as an attempt to deprive those in public life of freedom of conscience—itsself a constitutional violation.

The second and third *Lemon* prongs—whether the governmental action has a primary effect that advances or inhibits reli-

561. See *supra* part III.B.

562. See *id.*

563. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); see *supra* notes 43-44 and accompanying text.

564. Cf. *supra* notes 66-84 and accompanying text (describing the difficulties posed by the separationist principles utilized by the Court in Establishment Clause cases).

565. See *supra* notes 317-75 and accompanying text.

gion,⁵⁶⁶ and whether it fosters excessive entanglement with religion⁵⁶⁷—could be appropriate inquiries under the historical approach. However, their significance would change. Clearly, if a governmental action has a primary effect that advances or inhibits religion, or fosters excessive government entanglement with religion, it might well present an unacceptable danger of the institutional merger of church and state. The Court would have to apply such tests, however, in the light of the true danger to be avoided and the goals to be achieved. The *primary* effect of the governmental action, or its potentially *excessive* entanglement with religion, would have to be evaluated in this light.

In addition, and perhaps more fundamentally, a finding that a particular use, symbol, or practice is religious in nature would no longer be conclusive evidence of an Establishment Clause violation. Under the Court's current approach, any affirmative answer to these questions is determinative and fatal. If a school instructional aid is used for a religious purpose, or if a symbol used by government has a "religious message," the Establishment Clause is violated. The existence of an Establishment Clause violation turns wholly on what is (as an analytical and practical matter) an often entirely arbitrary attempt to categorize such things as religious *or* secular⁵⁶⁸—an attempt that founders on the mixed nature of many uses, functions, and symbols.⁵⁶⁹ Where the practice in question is an historic one, with clearly religious elements (such as legislative prayer and many national mottos), the Court's position has created particular difficulties. Since, under the Court's approach, any finding of the "religious" nature of such uses, symbols, or practices requires the finding of an Establishment Clause violation, its only recourse has been denial of their religious nature⁵⁷⁰—a completely improbable conclusion.

566. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

567. *Id.* at 612-13 (citing *Walz v. Tax Comm'n*, 397 U.S. 644, 674 (1970)).

568. *See supra* notes 74-77 and accompanying text.

569. *See supra* notes 78-84 and accompanying text.

570. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2468-69 (1993); *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968); *Allegheny County*, 492 U.S. at 615-21 (opinion of Blackmun, J.).

Under the historical approach, recognition of the religious use of a material resource, or governmental use of a religious symbol, might well be involved in determining whether a particular governmental action fosters the institutional merger of church and state. There would be no need, however, to arbitrarily deny the mixed nature of many uses, symbols, or functions, or to deny that many uses, symbols, and practices, although religious in nature, present no cognizable danger of church-state integration. Analysis would not turn upon the mechanical and often impossible separation of religious from secular messages, or religious from secular functions, and so on. Rather, it would go to the core issue: whether the governmental action in question fosters an aggregation of governmental and religious institutional power. The finding that a particular governmental action contains religious elements would not compel a conclusion that it advances or inhibits religion, fosters entanglement with religion, or is (by this reason alone) a violation of the Establishment Clause.

The endorsement test would have a similar, limited role under the historical approach. Whether a governmental action "convey[s] a message that religion or a particular religious belief is favored or preferred"⁵⁷¹ would appear to be the substantial equivalent of the historic concern that government observe a position of neutrality toward competing religious sects. However, under the historical approach, the limited role of equal treatment tests (whether framed in terms of endorsement or neutrality) must be remembered: they are only part of the equation. Even if a particular governmental use, symbol, or action appears to "endorse" or favor a particular religious group, that fact will not, alone, violate anti-establishment principles absent a further finding of dangerous church-state alliance. Conversely, even if principles of equality are not violated by a particular governmental action, the prohibition on religious and governmental institutional integration may well be. For example, massive governmental funding of all religious institutions may not violate principles of equality but may well present unacceptable dangers of the aggregation of governmental and religious insti-

571. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment).

tutional power. In all cases, the constitutionality of the governmental action must be evaluated against the fundamental area of historical concern.⁵⁷²

The question that remains is whether, under the historical approach, the outcomes of past cases would differ. Although such speculation is not easy, some differences are clear. Under the historical approach, public aid for sectarian elementary and secondary schools would not present an automatic violation of the Establishment Clause.⁵⁷³ Artificial distinctions between religious and secular uses of books or instructional aids,⁵⁷⁴ or pupil and institutional benefit tests,⁵⁷⁵ would no longer have de-

572. One remaining question is whether the endorsement test, with its implicit inclusion of preference for religion over nonreligion among prohibited governmental acts, sweeps more broadly than historical concerns of governmental neutrality. See *supra* notes 492-94 and accompanying text. In the end, this question has little practical impact, because it is virtually impossible for government to "endorse" religion without (in the course of defining that term) choosing among competing understandings of the religious. Indeed, if an affirmative governmental act *were* framed with sufficient latitude to avoid this problem (such as exemption from military service of all "religious" objectors, with that left to the definition of the adherent), there would be no "endorsement" in any meaningful sense at all. The Supreme Court has implicitly recognized this, by leaving unchallenged (on equal treatment grounds) those laws that leave the freedom to choose religious identity to the individuals or groups involved. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). It is those laws that attempt to impose state definition and sanction upon particular religious beliefs that run afoul of endorsement or neutrality tests.

573. Cf. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) (arguing that the Bill of Rights was intended to protect citizens' organizational structures as well as individual rights). For an attempt to apply this theory of "structural" recognition and protection to Free Exercise and Establishment Clause claims, see Mary A. Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

574. See e.g., *School Dist. v. Ball*, 473 U.S. 373, 386-89 (1985); *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

575. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2468-69 (1993) (direct loans of teaching material and equipment, the provision of state-paid personnel to provide remedial and accelerated instruction, and guidance counseling "aid . . . sectarian school enterprise[s]," while "[h]andicapped children, not sectarian schools, are the primary beneficiaries" of state-paid sign language interpreters provided to parochial school students) (quoting *Meek*, 421 U.S. at 366).

The institutional-child benefit distinction has come under harsh scrutiny in the Court. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 250 (1977) (distinction between equipment loaned to the pupil or the institution "exalt[s] form over substance"); *Ball*, 473 U.S. at 395 (rejecting "fiction that a . . . program could be saved by masking it as aid to individual students").

terminative force. The absurdity of such tests, both in the attempted categorization of such uses and benefits as religious or secular, and in the refusal of such tests to acknowledge the integrated planning and financing of religious institutions, could finally be acknowledged. Instead of attempts to separate religious and secular uses or benefits, a simple and straightforward question would be asked: does the proposed public aid create an unacceptable danger of the institutional merger of church and state? If it does, it is violative of the Establishment Clause; if it does not, it is not.

Indeed, many decisions by the Supreme Court in this area arguably reflect the silent usage of this test.⁵⁷⁶ Although inconsistencies remain, assessment of the danger of church-state merger often presents a more coherent explanation for the Court's decisions than the stated reasons for its actions. Decisions permitting the provision of sign-language interpreters,⁵⁷⁷ loans of secular textbooks,⁵⁷⁸ basic bus fares,⁵⁷⁹ and diagnostic services⁵⁸⁰ to students in parochial schools are more readily explainable on the basis that they present no realistic danger of church-state merger than that they present no "religious" use of public money. Other examples of public assistance currently forbidden to sectarian schools—such as the limited provision of projectors, tape recorders, and record players,⁵⁸¹ the lending of institutional equipment or materials,⁵⁸² or the provision of counseling and testing services⁵⁸³—would appear to present a no more palpable danger of institutional merger, and should (under the historical test) be permissible as well.

A question which arises is what the limits of this approach might be. Would public financial support of sectarian education-

576. In two cases, the Court's decisions have explicitly turned on concerns about the "fusion" of governmental and religious functions. See *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2488-90 (1994) (plurality opinion); *Larkin v. Grendel's Den*, 459 U.S. 116, 126, 127 (1982).

577. See *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993).

578. See *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

579. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

580. See *Wolman v. Walter*, 433 U.S. 229, 241-44 (1977).

581. See *id.* at 248-51.

582. See *Meek v. Pittenger*, 421 U.S. 349, 363-66 (1975).

583. See *id.* at 367-72.

al institutions *ever* present the dangers that those in the Founding Era feared? Clearly, if some sectarian institutions receive public support to the exclusion of others, or if sectarian institutions receive support to the exclusion of nonsectarian ones, the choice of particular recipients for governmental largesse would violate historical principles of equality and create a clear danger of church-state alliance. The provision of aid on an even-handed basis presents a more difficult question. If *all* educational institutions receive *equal* governmental support, would this implicate historical concerns?

This question is hardly academic. Educational "choice plans," now advocated by many educational reformers and governmental leaders, are pending in legislatures nationwide. Many feature the use of public-funding "vouchers" for education in all schools—including those of a sectarian nature.

The fact of equal treatment, alone, does not answer this issue. Equality, in the historical view, was only a part of the larger concern of the institutional alliance of church and state, and the resulting corruption of each. The concerns of reformers—that governmental financial support of religious institutions would promote their involvement in government, their meddling with laws, their grasping for money, and their attempts to protect governmentally-bestowed privileges and emoluments—are presented no less by the public funding of all religious institutions than by the funding of few. Rather, the answer becomes unavoidably, and perhaps uncomfortably, one of degree: while incidental public support for sectarian institutions (on a basis equal to public institutions and to each other) probably presents little danger of institutional alliance of church and state, extensive funding may pose significant danger.⁵⁸⁴

This change in approach would have widespread effects. Public financial support for religious institutions exists throughout our governmental system: governmental grants for sectarian charitable activities, public financial assistance to sectarian universities, and public financing of religious counseling ser-

584. Indeed, in a recent case, the Court articulated a standard that explicitly incorporates the *amount* of aid received as a relevant factor under the Establishment Clause. See *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2468 (1993).

vices, to name a few. Under current law, all of these practices have received Court approval⁵⁸⁵—generally under the fiction that religious activities of sectarian institutions could be separated from secular activities, with taxpayer aid “channeled” only to the latter. Under the historical approach, such fictions would be abandoned, and all of these forms of governmental involvement with religious institutions would be subject to scrutiny and would be potentially violative of the Establishment Clause. Distinctions between aid to sectarian elementary and secondary schools and aid to other sectarian institutions, often used to uphold such financing, would have no bearing on the issue. Indeed, in the ostensible reason for this distinction—that religious indoctrination occurs in a uniquely effective manner in settings of elementary and secondary school children⁵⁸⁶—it is difficult to imagine a greater departure from historical assumptions. Those in the Founding Era were not concerned with the existence of religion in the lives of those who chose those beliefs. Rather, they were concerned with compelled taxpayer support of religious institutions, be they charitable, higher educational, or of whatever nature.

Government involvement in religious recommendations, proclamations, and exercises, also presents a sensitive danger. Here, the symbolic nature of governmental actions is so powerful, the difficulty in avoiding choice among religious sects so difficult, and the dangers of church-state alliance or merger so subtle, that great vigilance would be required. The Court’s traditional concerns with the vulnerability of the audience, the decline in religious meaning of particular acts through long, historic usage,⁵⁸⁷ and the existence of religious or nonreligious contexts for particular words or symbols,⁵⁸⁸ would certainly be of rele-

585. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988) (approving public grants to sectarian teenage counseling centers); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (approving public aid to religiously-affiliated colleges); *Tilton v. Richardson*, 403 U.S. 672 (1971) (same); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (approving public aid to church-run hospital).

586. See, e.g., *Tilton*, 403 U.S. at 685-86 (stating that federal aid to church-related colleges is permissible for the reason, among others, that college students are “less impressionable” than elementary and secondary school students to religious influences).

587. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983).

588. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 679-81 (1984) (discussing the im-

vance (although not determinative) under the historical approach. In each instance, the question would be whether the particular usage, exercise, symbol, or action not only carries religious content but also presents, in its particular context, a danger of church-state alliance. Under this test, the outcomes in many cases would track the Supreme Court's decisions. The use of prayers or devotional texts in public schools would violate the principle of church-state separation,⁵⁸⁹ as would the display of clearly religious injunctions on the walls of a public school classroom.⁵⁹⁰ Public use of religious symbols that have obtained broader cultural meaning would present less danger.⁵⁹¹

Other issues would have starkly different outcomes. Sunday closing laws,⁵⁹² and other governmental acts that involve particular sabbatarian choices, would be particularly difficult to sustain under an honest application of the historical approach.⁵⁹³ Although such laws survived the efforts of reformers, they are clearly a vestige of comprehensive state religious establishments.⁵⁹⁴

portance of context in the constitutional evaluation of objects in a Christmas display).

589. *See, e.g., Lee v. Weisman*, 112 S. Ct. 2649 (1992) (reaffirming the Court's prohibition of state-sponsored and state-directed religious exercises in public schools).

590. *See Stone v. Graham*, 449 U.S. 39 (1980) (holding that a statute requiring posting the Ten Commandments in public schoolrooms was unconstitutional).

591. *See generally County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (discussing usage of religious symbols in Christmas season displays); *Lynch*, 465 U.S. 668 (same).

592. *See, e.g., Braunfeld v. Brown*, 366 U.S. 599 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961).

593. *See generally* ROBERT T. HANDY, *A CHRISTIAN AMERICA* 42-45 (1984) (describing Sunday closing laws as an attempt by Protestant religious groups to create a "Christian civilization").

594. For instance, the Reverend John Leland, a dissenting Protestant minister, wrote:

If Jesus appointed the day to be observed, he did it as the head of the church, not as the king of nations; or if the apostles enjoined it, they did it in the capacity of Christian teachers, and not as human legislators. As the appointment of such days is no part of human legislation, so the breach of the Sabbath (so called) is no part of civil jurisdiction. I am not an enemy to holy days . . . but these times should be fixed by the mutual agreement of religious societies . . . and not by civil authority.

JOHN LELAND, *THE VIRGINIA CHRONICLE* (1790), *reprinted in* *THE WRITINGS OF JOHN LELAND*, *supra* note 517, at 119.

State laws excluding clergy from public office would also be evaluated for what they are: efforts to achieve institutional separation of church and state. The Supreme Court struck down such a Tennessee law, on the ground that it violated the clergy's civil rights and free religious exercise. There is, the Court wrote, "no persuasive support for the fear that clergymen in public office will be . . . less faithful to their oaths of civil office than their unordained counterparts."⁵⁹⁵ Under the historical approach, the question would not be whether individuals could execute religious and secular functions, but whether persons who hold positions of particular authority in religious institutions should also hold positions of civil power. Should a cardinal of the Roman Catholic Church, a bishop of the Episcopal Church, or the head of the Lutheran Church in America serve as a United States Senator or President as well? Such engrafting of religious and secular power evoked a bitter taste for many early Americans, who knew from personal experience of the dangers of such arrangements. Although opinions on the question were divided during the Founding Era,⁵⁹⁶ the probable answer (under the historical approach) is that such dual office holding should be prohibited.

Consideration of the historical approach also illuminates another issue: why "sectarian" religious uses, functions, and symbols have triggered particular alarm in the Court's adjudication of Establishment Clause cases.⁵⁹⁷ The basis for this alarm has never been articulated by the Court. Indeed, if (as the Court assumes) the critical question is the separation of the religious from the secular, with a blanket prohibition of the former, it is difficult to justify greater opprobrium for "sectarian" belief than for "theistic" belief or belief of any other description.⁵⁹⁸ If, however, the critical question changes—if it is, instead, whether the governmental action tends to foster the institutional merger of church and state—the reason for fear of the sectarian is clear. Alliance of government with a particular, sectarian religious

595. *McDaniel v. Paty*, 435 U.S. 618, 629 (1978).

596. *See supra* notes 524-26 and accompanying text.

597. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

598. *See supra* note 147 and accompanying text.

group obviously carries greater danger than governmental alliance with diffuse "theistic" notions or other broad belief systems.

Lastly, use of the historical approach would answer one of the most difficult controversies in Establishment Clause jurisprudence: the question of the establishment of particular values by government. Somewhat ironically, those on the fundamentalist Christian right, who oppose the "establishment" of secular humanism in the public schools,⁵⁹⁹ and those of the civil libertarian left, who oppose attempts to interject creationism and other "religiously-based" doctrines into the same settings,⁶⁰⁰ share the same assumption: that laws motivated by religious concerns or rooted in religious beliefs present an apparent violation of the Establishment Clause. The Supreme Court condemned Louisiana's Balanced Treatment Act⁶⁰¹ because it found that "[t]he preeminent purpose of the Louisiana legislature was clearly to advance the religious viewpoint"⁶⁰² In a recent article in the *New York Times*, a writer alleges that "[a]round the country, a highly organized, well-financed movement is trying to return Biblical values—if not the Bible itself—to schoolrooms."⁶⁰³ Similarly, Christian fundamentalists who have challenged the teaching of "Jeffersonian Enlightenment" or "secular humanism" in the public schools have argued that such "antirevelatory" and "antisupernaturalistic" philosophies are "no less dogmatic than any other faith" and are only "particular religion[s] vying for dominance among others."⁶⁰⁴ Both groups argue that they should not be taxed to support schools involved in teaching "religious" values that they do not support.⁶⁰⁵

599. See *supra* note 170 and accompanying text.

600. See generally *Edwards v. Aguillard*, 482 U.S. 578 (1987).

601. Balanced Treatment for Creation-Science and Evolution Science in Public School Instruction Act, LA. REV. STAT. ANN. §§ 17:286.1-7 (West 1982).

602. *Edwards*, 482 U.S. at 591 (1987).

603. *A Campaign To Put Biblical Values in the Public Schools*, N.Y. TIMES, Apr. 13, 1994, at B11.

604. MCCARTHY, ET AL., *supra* note 314, at 49.

605. A distinction (rarely made) must be made between the teaching of religious values and the explicit teaching of religious or anti-religious doctrine. Teaching that "it is wrong to kill" must be distinguished from teaching that "God tells us it is wrong to kill" or "there is no god to tell us it is wrong to kill." The first involves the teaching of a particular value (which may coincide with particular systems of belief); the latter involves the teaching of religious or anti-religious doctrine, an

Such arguments point out an important truth and a different conundrum for existing Supreme Court jurisprudence. If, as the Supreme Court has intimated, the essence of religious belief is deep value choice,⁶⁰⁶ any value choice by government is sectarian. No matter what philosophical basis is chosen for the public school curriculum (or, presumably, for any other law), sectarian control exists and the Establishment Clause is violated. The common critique of the fundamentalists' position—that they are “really fighting for a restoration of the Protestant empire's values”⁶⁰⁷—although undoubtedly true, fails to address the question. If value choice is an Establishment Clause issue, there is no apparent constitutional justification for privileging any particular values over others in the nation's public schools or laws, because the choice of any values violates required governmental neutrality among competing religious sects.⁶⁰⁸ Indeed, even if the public school curriculum were somehow seen as “nonreligious” or value-neutral, its “establishment” would violate the required neutrality between religion and nonreligion that the Court has held that the Clause commands.⁶⁰⁹

Under the historical approach, these claims fail because their shared central premise fails: the Establishment Clause does not prohibit the existence of religious values, beliefs, or ideals in the

enterprise clearly condemned under any interpretation of the Establishment Clause.

606. See *supra* note 25 and accompanying text.

607. Martin Marty, *Foreward*, to MCCARTHY, ET AL., *supra* note 314, at xiii.

608. See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (Establishment Clause forbids not only state practices that “aid one religion . . . or prefer one religion over another”, but also those that “aid all religions”). As Stephen Arons has written:

Up to this point, the effect of the Court's schooling cases has been to uphold and entrench the legal fiction that schooling can be value-neutral. By its use of the secular-religious dichotomy the Court has been able to eliminate an obvious form of belief manipulation—religious observance—from public schools, but it has thereby implied that the secular content of schooling does not touch upon the basic beliefs and values of students

Stephen Arons, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. EDUC. REV. 76, 97 (1976).

609. See *Lee v. Weisman*, 112 S. Ct. 2649, 2667 (1992) (Souter, J., concurring) (stating that the Establishment Clause applies “no less to governmental acts favoring religion generally than to acts favoring one religion over others”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”).

workings of government. Those values, beliefs, and ideals—whether Jewish, Baptist, secular humanistic, or something else—are an accepted, integral, and necessary part of social and governmental institutions. As a consequence, the existence of religious motivations of lawmakers, or the coincidence of public school teachings and particular belief systems, presents no violation of the Establishment Clause. Rather, the central concern and language of the debate is different. It is not the establishment of values that should trigger concern; it is the merger of institutional church and state. The religious or nonreligious content of school curricula or other laws is relevant only as part of a larger issue: that of the danger of merger or alliance between institutional church and state. When viewed in this light, a law such as Louisiana's Balanced Treatment Act might fail; but if it does, it will be because of the *actuality* of the danger of church-state merger, not because of its simple coincidence with (particular) religious values.

Historical recognition of the inseparability of the religious and the secular does not, in short, result in the eradication of all limitations in the reach of the Establishment Clause. Rather, it restricts the scope of that Clause to the protection of freedom of conscience through prohibition of the merger of governmental and religious institutional power. Linda Kerber has written that in the Founding Era, it was believed that "[r]eligious obligation would reinforce moral obligation."⁶¹⁰ It was a paradox "that religious faith was a necessary ingredient in a social order which forbade the establishment of religion."⁶¹¹ This paradox exists only if the "establishment of religion" is seen as the eradication of religious beliefs, ideals, and values from the processes and products of government. No paradox arises if these issues are understood now as they were understood then: that the process of free, individual inquiry, and the religious or transcendent beliefs that it yields, are a vital part of the foundations of society and government; and the merger of governmental and religious institutional power is prohibited for their protection.

610. KERBER, *supra* note 18, at 208.

611. *Id.*

D. The Historical Approach: Is the Irreconcilable, Reconciled?

It has long been stated that the Religion Clauses of the First Amendment present an irreconcilable conflict. The Establishment Clause, in the view of the Supreme Court, comprises two basic principles: one "of 'absolute equality before the law, of all religious opinions and sects,'"⁶¹² and one of governmental neutrality between religion and nonreligion.⁶¹³ These principles present a central, theoretical problem because the Court's approach to the Establishment Clause clearly implies differing treatment of the religious and the secular, as does the explicit language of the Free Exercise Clause. The religious and the secular clearly are distinguished and treated unequally, whether the goal is the protection of the public realm from religious values, motivations, symbols, or exercises, or the protection of the private interests in free exercise from undue public interference. In short, "neutrality" in establishment seems to contradict the need to prevent the establishment of religion by government or to protect (and privilege) religious free exercise.

The apparent irreconcilability of the Establishment and Free Exercise Clauses presents an intriguing historical question. We, as the legatees of the Founding Era, might well be burdened with this irreconcilability, to deal with as best we might. But what about the reformers, who presumably had choice in the matter? Surely, they must have been aware of the problem that they created. If they were, why did they create it? Or (perhaps more fairly) why is it never discussed, in anything resembling recognizable terms, in the writings of this era?

We can never know the reasons for silence. What answers might have been made to an objection, never posed, are impossible to guess. What we can say, with some confidence, is that the reformers apparently assumed that concepts of equality and the special treatment of the religious existed in harmony. Where the issue was the differing treatment of particular religious sects by government, the reason is apparent: the drive toward disestablishment was perfectly consonant with the principle of equality.

612. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 215 (1963).

613. *Epperson*, 393 U.S. at 103-04.

Religious, sectarian differences, then more frightening and raw than at any later time in our history, in fact impelled the drive toward equal treatment of all.

The apparent privileging of the religious over the nonreligious—by free exercise guarantees and the apparent belief, in the Founding Era, that they presented no difficulty under the Establishment Clause—presents a more difficult question. The ease with which privileged, religious expression coexisted with concepts of equality could be attributed to a general failure to consider the question. Challenges to general religious preference are most often raised by religious skepticism, a phenomenon little known in that era.

It is far more likely that the answer lay in the view of the relationship between the religious and the secular that prevailed at that time. If (as in the modern era) the religious and the secular are seen as separate spheres, competing for supremacy, the privileging of one over the other becomes a problem of potentially large dimensions. If (as in the Founding Era) the religious and the secular are seen as inseparable parts of all aspects of life, problems of “equality” lose their force. Although bitter differences existed as to what the legitimately religious was, virtually all agreed that the religious deserved protection because of its assumed role in individual and collective life.

Seeming nonconcern with problems of equality might also be traced to the core concept that underlay anti-establishment and free exercise principles: the idea of freedom of individual conscience. The fundamental, irreducible value for the reformers of this era was the protection of individual conscience. When government attempted to *prescribe the content of belief*, or acted in a way that might lead to attempts to prescribe belief—whether through governmentally-enforced religious creeds, restrictions on religious free exercise, or the merger of governmental and religious institutions—the reformers’ core value was threatened.

If free exercise and anti-establishment principles are viewed in this way—if they are seen as rooted in the preservation of the freedom of individual belief—problems of equality, or irreconcilability, disappear. Freedom of religion, understood as freedom of conscience, is a value that all human beings share; it is not the prerogative of “believers” alone. To the extent that religion is

particularly protected, principles of equality are not offended because the right that it protects (freedom of conscience) is something available and valuable to all. As I have argued in another context, the concept of a general right must be distinguished from particular instantiations of that right.⁶¹⁴ Modern claims that religion is "privileged" *assume* that only some have an interest in this right. In fact, freedom of conscience is of universal value to all individuals and to the societies they create.⁶¹⁵

Problems of *discrimination against* the religious—another form of inequality—are ameliorated as well. When the focus of anti-establishment efforts is the protection of freedom of conscience and, consequently, the enforcement of church-state institutional separation, the problems inherent in attempts to exclude religious motivations, values, and ideas from the public sphere are avoided. The discrimination against religious persons that inevitably results from efforts to separate the religious from the secular, root and branch, is not present when the role of the religious in public life is an accepted and expected phenomenon. It is true, of course, that differing treatment of religious and secular *institutions* remains under the historical approach. Founding Era reformers accepted this result because their understanding of the concepts of government neutrality and equality did not extend so far. Dangers to freedom of conscience—the primary and overriding value—justified the prevention of church-state merger. Faced with this issue, and its history of oppression, there was no hesitancy in their choice.

The seeming irreconcilability of Free Exercise and Establish-

614. See Laura S. Underkuffler, *The Perfidy of Property*, 70 TEX. L. REV. 293, 307-08 (1991) (book review) (discussing the general concept of property protection and the protection of existing property distributions); see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 168-70 (1986) (discussing the distinction between general rights and particular rights).

615. Cf. generally RICHARDS, *TOLERATION*, *supra* note 333 (arguing that toleration, or freedom of conscience, is a necessary foundation for governmental systems based upon contractarian assumptions that all persons are free, rational, and equal); JOHN RAWLS, *A THEORY OF JUSTICE* 205-11 (1971) (positing that persons in the "original position," who are aware of their fundamental religious, moral, and philosophical interests, but unaware of the particular content of those interests, would choose equal liberty of conscience as a binding principle).

ment Clause principles is, in fact, the product of our narrow sense of the religious and of its role in public life. In the Founding Era, reformers assumed otherwise. Perhaps, as we face modern conflicts, we should consider their ideas again.

V. SOME FURTHER REFLECTIONS AND CONCLUSION

Acknowledgement of the inseparability of the religious and the secular in individual and collective life may seem like a radical act. The model of separate religious and secular spheres, vying for supremacy, each antagonistic to the other, with a "wall of separation" erected for mutual protection between them, is so entrenched in our thinking as to be a throw-away phrase of obvious truth in judicial and scholarly work. The phrase is repeated, again and again, as if its very simplicity will make it true.

We are afraid to see the world as it exists. We are afraid, as the custodians of liberal democracy, that with religion comes intolerance, bigotry, and the end of state neutrality. We are aware of the course of religious persecution, oppression, and death throughout recorded human history. Afraid of this knowledge, afraid of the relaxation of vigilance, we draw our lines—again and again—only to be undermined (yet again) by the contradictions we assume.

The religious voice is strident. It asserts its truth and cites as its sources ways of knowing inaccessible to others. The religious—with its claims to special recognition, protection, prerogatives, and privileges—seems to confound our deepest instincts of equality. The dangers of such ideas reverberate uneasily in our collective conscience.

The idea that issues of religious *truth* should be excluded from the public agenda, as divisive and unamenable to compromise, is undoubtedly a good one.⁶¹⁶ The couching of political argument or public dialogue in explicit terms of religious truth may well contribute to social and political fragmentation. The attempted exclusion of explicitly religious arguments is, however, one

616. See, e.g., ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); Stephen Holmes, *Gag Rules or the Politics of Omission*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 16, at 19.

thing; the attempted exclusion of religious values, beliefs, questions, and so on, is another.

In the American Founding Era, reformers believed that individuals are empowered to make moral judgments; indeed, they cannot "alienate" this power, even if they wish to do so. Under this vision, the residual and inalienable power of individuals to exercise conscience, to make moral judgments, was not seen as threatening the polity with disintegration. On the contrary, the process of moral questioning was assumed to be fundamental to—indeed, the *a priori* basis for—free government.

The dangers that come with the loss of this perspective are profound. To avoid imagined divisiveness, discord, and threats to the body politic, we risk the loss of individual conscience in public life. This is true, despite the fact that conscience often has provided the only contemporary voice against what we now universally agree to have been atrocities in human history.

The religious reminds us, however uneasily, of the questions that we, as a culture, often try to deny: the question of the presence (or absence) of shared values, the question of the presence (or absence) of enduring meaning in our lives. A recent book describes in compelling detail the struggle for the evolution of meaning in the lives of middle-class Americans committed to the individualism of liberal culture.⁶¹⁷ A lawyer in Silicon Valley is quoted as saying that "life is a big pinball game and you have to be able to move and adjust yourself to situations if you're going to enjoy it. You got to be able to realize that most things are not absolute. Very little is, other than life and death."⁶¹⁸ Individuals speak "a language of radical individual autonomy, a world of no connection, other than the most utilitarian, to community or to the world beyond the self and a few intimate relations."⁶¹⁹ The authors write:

Separated from family, religion, and calling as sources of authority, duty, and moral example, the self seeks to work out its own form of action by autonomously pursuing happiness and satisfying its wants. But what are the wants of the

617. BELLAH, ET AL., *supra* note 14, at 77.

618. *Id.*

619. *Id.* at 81.

self? By what measure or faculty does it identify its happiness? In the face of these questions, the predominant ethos of American individualism seems more than ever determined to press ahead with the task of letting go of all criteria other than radical private validation.⁶²⁰

The religious reminds us of value choice. It reminds us of the search for principles that will provide the foundations for social and governmental order. It reminds us that liberal democratic government requires, at the very least, commitment to the rule of law and some understanding of what the law should be. Why do we agree that slavery is universally, morally repugnant? What other forms of human oppression should we refuse to accept, in our society or in our world? The religious reminds us of the depth, complexity—and indeed, the very existence—of such questions.

Ideas of conscience, public virtue, and value choice—so important during the Founding Era—may seem quaint to us in this age of preference maximizing and other wizardries. However, underneath all of our professed sophistication, we remain human. The failure of the “science” of secularized, liberal theory to account for “nonrational” or religious yearnings has been cited as a primary reason for the popular decline in the appeal of liberal political ideology and the rise of the politics of right-wing evangelism in its stead.⁶²¹ This failure also has resulted in the tacit denial of the importance of the mystical, the emotional, and the symbolic in our lives. The spiritual impulse persists, in part, because of the certitude of illness, loss, suffering, and death. The denial of the “religious” in public life has mirrored a denial of the human yearning for meaning beyond ourselves, for ways of knowing that transcend those of ordinary human experience. As the result of this denial, we suffer a cost not only to legal coherence, but to the human spirit as well. With the denial of this part of life, each is, in the end, “shut up in the solitude of his

620. *Id.* at 79.

621. See generally MOONEY, *supra* note 6, at 16; Robert N. Bellah, *The Japanese and American Cases*, in BELLAH & HAMMOND, *supra* note 14, at 37; Carter, *supra* note 16, at 995.

own heart."⁶²²

The attempt to relegate the religious to the private realm has impoverished our ideas about the role of conscience in public life. Its implicit denial—that government must implement values, and that values (if they are to be more than arbitrary choices) must rest upon shared concepts of what is just, moral, and right in our lives—has created deep conflicts in First Amendment jurisprudence. It has created deep conflicts in our perceptions of both government and ourselves.

622. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 508 (George Lawrence trans., 1966).