

Religion in the New Republic

Richard Albert

Repository Citation

Richard Albert, *Religion in the New Republic*, 67 La. L. Rev. (2006)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol67/iss1/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Religion in the New Republic

Richard Albert*

TABLE OF CONTENTS

I.	Introduction	1
II.	Defining Establishment	6
	A. Religion	8
	B. Established Church	12
	C. Establishment of Religion	13
III.	Modern Establishment Doctrine	15
	A. The Establishment Labyrinth	17
	B. The Establishment Edifice	21
IV.	Early Establishment History	22
	A. Disestablishment in the Several States	23
	B. Early Establishment Doctrine	40
V.	Conclusion	53

I. INTRODUCTION

The Establishment Clause¹ is a puzzle that remains unsolved to this day.² The fog enveloping the Establishment Clause springs at

Copyright 2006, by LOUISIANA LAW REVIEW.

* J.D., B.A. Yale University. Email: richard.albert@aya.yale.edu. I am grateful to several friends for our discussions on the role of religion in the American Republic and for their comments on previous drafts of this article. I am particularly indebted to Bruce Ackerman, Rex Ahdar, Akhil Amar, Anita Bernstein, Stephen Carter, George Dent, Howard Friedman, Marci Hamilton, Tarik Haskins, Brooks Holifield, Mark Jordan, Paul Kaufman, Kris Kobach, Jon Nichols, Larry Obhof, Michael Perry, Anthony Picarello, Frank Ravitch, Charles Rice, Ron Rychlak, John Wagner, and Daniel Walfish. I am also appreciative of the exceptional editors of the Louisiana Law Review—specifically Amanda Coney, Jacob Kantrow, Alexander Mijalis, and Alison Nunez—for their careful criticisms and attention to detail in bringing this article to print.

1. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

2. Troy L. Booger, *Finding Religion for the First Amendment*, 38 J. MARSHALL L. REV. 469, 487 (2004) (“Scholars have attempted to solve this puzzle in different ways.”); see also Jonathan Frels, Note, *Simplifying Establishment Clause Jurisprudence in Student-Selected Prayer Cases Through*

once from its indeterminate text,³ disputed history,⁴ and incoherent application by federal and state courts.⁵ Yet what constitutes an establishment of religion is not in and of itself a theoretically obscure concept. Applying theory to practice, however, has proven elusive. Indeed, if anything is discernible from the evolving case law on the Establishment Clause, it is that the common law doctrine of establishment is anything but consistently applicable to real world disputes.

But the Establishment Clause was not inherently fated to this dismal destiny when it was conceived two centuries ago by America's founding luminaries. On the contrary, as the first civil freedom enshrined in the United States Bill of Rights, the Establishment Clause once held—and indeed continues to hold—great promise for the American project of democracy. Much of that promise was stunted in the early days of nationhood as a result

the Use of Public Forum Principles, 20 REV. LITIG. 233, 236 (2000) (characterizing Establishment Clause as a "puzzle").

3. Leslie Gielow Jacobs, *Even More Honest Than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Interpretation*, 1995 U. ILL. L. REV. 363, 380 (1995) (tracing difficulty of interpreting Establishment Clause to its indeterminate text).

4. Frank Guliuzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 DRAKE L. REV. 343, 372 (1993) (arguing that history of Establishment Clause is unsettled and conflicting); see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 237–38 (1963) (acknowledging that history of Establishment Clause is ambiguous).

5. *Compare Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998) (holding that prayer and moment of silence at school events did not violate Establishment Clause), *with Chandler v. James*, 985 F. Supp. 1062 (M.D. Ala. 1997) (invalidating statute providing for voluntary prayer at school events as violative of Establishment Clause); *compare Ala. ex rel. James v. ACLU of Ala.*, 711 So. 2d 952 (Ala. 1998) (holding unjusticiable claim that judge impermissibly displayed Ten Commandments plaque in courtroom), *with Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997) (concluding that citizen has standing to challenge constitutionality of Ten Commandments' display in courtroom); Benjamin S. Genshaft, Note, *With History, All Things Are Secular: The Establishment Clause and the Use of History*, 52 CASE W. RES. L. REV. 573, 574, 592–93 (2001) ("This ambiguity regarding the cultural value of a religious practice makes it difficult for lower courts to apply the fabric of society logic on a consistent basis."); See, e.g., Harlan A. Loeb, *Suffering in Silence: Camouflaging the Redefinition of the Establishment Clause*, 77 OR. L. REV. 1305, 1335 (1998) ("The Supreme Court's inconsistency in analyzing Establishment Clause cases has given lower federal and state courts excessive leeway to interpret these cases. With no firm doctrine to guide them, and more acute extra-jurisprudential pressures, judges have a number of tests from which to choose and no guidance or safe haven upon which they can comfortably rely.").

of an unsteady and intellectually uneven application of the Clause. Still today, America's first freedom has yet to recover from its confusing construction during the first years of the American republic.

Many point directly to the Supreme Court of the United States for this lamentable state of affairs.⁶ I disagree with this diagnosis.

6. See, e.g., Leonard W. Levy, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 221 (2d ed. 1994) (arguing that the Court has "reaped the scorn of a confused and aroused public because it has been erratic and unprincipled in its decisions"); *id.* at 220-22 ("The Supreme Court has been inexcusably inconsistent in its interpretation of the establishment clause."); Stephen L. Carter, *THE CULTURE OF DISBELIEF* 109 (1993) (observing that "the embarrassing truth is that the Establishment Clause has no theory"); Kevin T. Baine, *Education Litigation: Prospects for Change*, 35 CATH. LAW. 283, 287 (1994) (declaring that "the Supreme Court has decided a series of education cases that, read together, simply defy comprehension"); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 693 (1997) ("That the Supreme Court has made a mess of this area is agreed to by most everyone, including many of the justices themselves."); Erwin Chemerinsky, *Why the Rehnquist Court is Wrong About the Establishment Clause*, 33 LOY. U. CHI. L.J. 221, 236 (2001) ("The Rehnquist Court is just wrong when it comes to the Establishment Clause."); Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 578 (1996) ("[A]n examination of the Supreme Court's jurisprudence of religious liberty is not at all reassuring. True, it is relatively theory-free, but, as most commentators and many of the Justices would agree, it is also a complete hash."); David Felsen, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395, 396 (1989) (stating that courts have developed "an ad hoc approach to establishment clause analysis"); Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233, 1233 (1997) ("Recent scholarship on the religion clauses has displayed a persistent preoccupation with the obvious lack of coherence in the Supreme Court's decisions in this area."); Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 674 (1992) (stating that "the Supreme Court's Religion Clause case law has reached the point where it is described on all sides as confused, inconsistent, and incoherent"); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 536 (1991) ("A majority of the members of the current Court now appear to have concluded that the Religion Clause jurisprudence of the past fifty years is seriously flawed."); Mark R. Killenbeck, *The Qualities of Completeness: More? or Less?*, 97 MICH. L. REV. 1629, 1657 (1999) (arguing that "the Court's various solutions to the [establishment] problems are often confused and confusing at best"); William P. Marshall, *"We Know It When We See It": The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 495 (1986) ("In the forty years since *Everson*, the Court has reached results in establishment cases that are legendary in their inconsistencies."); Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 125 (2000) (arguing that "Establishment Clause jurisprudence remains plagued by inconsistencies"); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1336 (1995) ("The Court has

It is an inaccurate and incomplete criticism to blame the Supreme Court for the current landscape of establishment jurisprudence. Modern establishment doctrine—incoherent though it may be⁷—is more properly viewed as an evolving product of the continuing public constitutional discourse among Americans and between public and private forces about the proper role of religion in the American polity. Just as early Americans debated among themselves, armed with their differing hopes and visions about how to mediate the intersection of religion and the state, so too Supreme Court decisions have, on a parallel track, reflected the changing contours of this important debate—a conversation that has yet to cede center stage in the American public square.

Nevertheless, it is true that in the period leading up to and immediately following disestablishment in the several states, the Supreme Court struggled to delineate what an impermissible establishment of religion entailed as a matter of law. Drawing upon colonial practices that had fostered intimate, if not inextricable, ties between religion and the state—a union that was, nonetheless, wholly in keeping with the laws of the time⁸—the Court defined an impermissible establishment of religion simply

held that some governmental actions violate the Establishment Clause, while others do not, without articulating a principled or even discernible distinction between the constitutional actions and those held unconstitutional.”); Ronald Y. Mykkeltvedt, *Souring on Lemon: The Supreme Court's Establishment Clause Doctrine in Transition*, 44 MERCER L. REV. 881, 883 (1993) (stating that the Court has “evinced a schizoid approach to Establishment Clause cases, moving erratically between the strict separationist standard promulgated in *Everson* and the accommodationist theory advocated by Justice Reed”); Steven D. Smith, *Separation and the “Secular”: Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 956 (1989) (stating that the Court’s “[p]revailing doctrine is widely disparaged by commentators and Supreme Court Justices alike”); Christal L. Hoo, Comment, *Thou Shalt Not Publicly Display the Ten Commandments: A Call for a Reevaluation of Current Establishment Clause Jurisprudence*, 109 PENN ST. L. REV. 683, 697 (2004) (arguing that the Court’s “historical method of relying simply on imperfect analogies with past practices has produced inconsistent results”). See also *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (“Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions.”) (citations omitted); *Edwards v. Aguillard*, 482 U.S. 578, 636, 640 (1987) (Scalia, J., dissenting) (stating that the Court has “made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional”).

7. Mark V. Tushnet, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 247 (1988) (describing religion jurisprudence as being “in significant disarray”).

8. See *infra* Part IV.A.

with reference to what had once been allowable under the laws of the several establishmentarian states prior to disestablishment.

The Court's first definitions of an establishment of religion set the constitutional terms of reference as a negation—that is, according to what had once been lawful.⁹ The consequence was to frame the purpose of the Establishment Clause as a protection from something destructive, rather than as an aspiration to something virtuous. Thus, the Court initially defined the Establishment Clause as a necessary shield against forces that could unravel the fabric of the new nation. But this defensive posture toward religion did not endure.¹⁰

The Court's first forays into the scope of the Establishment Clause were cacophonous and conceptually elusive. Specifically, in the same breath that it spoke of the Establishment Clause as a necessary safeguard against the infusion of religion into public life, the Court also described religion as a vital feature of the American polity, one that most accurately defined the emergent national identity of the dissimilar peoples that then populated the new American republic.¹¹ On the one hand, religion was to be viewed with circumspection. Yet, on the other, religion was extolled as the cornerstone of the American way of life. The Court, therefore, conveyed a conflicting message about the role and importance of religion, simultaneously cautioning against its disruptive potential and exalting its unique function in the American project of democracy. These early pronouncements cultivated an unshakable ambiguity in the purpose and meaning of the Establishment Clause that persists to this day. However, it is incorrect to name the Supreme Court as the definitive source of the disharmony that has become synonymous with the Establishment Clause.

In this article, I endeavor to move beyond simply condemning the judiciary for creating and subsequently sustaining, with its erratic pen, the incoherence that characterizes modern establishment doctrine. I seek instead to discover the knotty roots of the Court's evolving establishment case law. In Part II, I demonstrate that the three elemental principles that must inform any construction of the Establishment Clause are not intrinsically hopeless to define: (1) an established church; (2) an establishment of religion; and (3) religion. Indeed these terms—even the otherwise complex term *religion*, for which the Court has devised a sensible definitional strategy—are theoretically straightforward to understand. However, as a matter of practice, these terms are

9. See *infra* Part IV.B.

10. *Id.*

11. *Id.*

inordinately intricate and, therefore, unusually challenging for the judiciary to situate in the context of a private or public dispute. I lay this to bare in Part III, which canvasses the labyrinth of often inexplicable and discordant cases that have been decided pursuant to the Establishment Clause.

In Part IV, I seek to explain why establishment jurisprudence is so incoherent. I trace the origin of establishment dissonance to the early years of the new republic, an era during which the colonies-turned-states were themselves unsure about the role of religion in the emerging nation. Some states at once mandated Christian beliefs while purporting to afford their citizens religious freedom. Others even disclaimed established churches in their constitutional documents, just as they extended certain advantages and privileges to particular religious faiths. On this view, the incoherence of the modern establishment case law did not emerge from the judiciary. It sprang instead from the new republic itself, a loose collection of states that were both individually and collectively struggling to find a way to accommodate the diversity of religious beliefs of the day, while also ensuring that public institutions would be neither animated nor driven by religious preferences. In Part V, I close with a few remarks about the role of religion in participatory democracy and the future course of establishment case law.

II. DEFINING ESTABLISHMENT

The Bill of Rights forbids the establishment of an official state religion. By its own terms, the Establishment Clause prohibits Congress from passing a law designating a national religion.¹² The reach of this interdiction has extended beyond the federal government since 1947, the year marking the Supreme Court judgment incorporating the Establishment Clause against the several states.¹³ The Bill of Rights also contains the Free Exercise Clause, pursuant to which neither Congress nor the states, since 1940,¹⁴ may encroach upon the right to freely practice any

12. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

13. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the Establishment Clause).

14. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause).

religion.¹⁵ Together, these twin constitutional protections embody the promise of religious liberty in American constitutional law.¹⁶

But the meaning of the Establishment Clause has continued to confound both judges¹⁷ and scholars.¹⁸ Though most agree that the Establishment Clause should be governed by a rule of neutrality, judges and scholars disagree on the proper scope of this mandated neutrality.¹⁹ They also disagree on whether the Establishment Clause should constrain the several states.²⁰ Three phrases—each

15. U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

16. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (“Indeed, the common purpose of the Religion Clauses is to secure religious liberty.”) (citations omitted).

17. See, e.g., *Rosenberger v. Rector*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (describing Establishment Clause case law as in “hopeless disarray”); *County of Allegheny v. ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part, dissenting in part) (stating that “[s]ubstantial revision of our Establishment Clause doctrine may be in order”); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980) (Blackmun, J., dissenting) (identifying the need for “a single, more encompassing construction of the Establishment Clause”).

18. See, e.g., Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 839 (1984) (stating that Establishment Clause doctrine is “muddled and internally inconsistent”); Philip B. Kurland, *The Religious Clauses and the Burger Court*, 34 CATH. U. L. REV. 1, 10 (1984) (declaring that Establishment Clause decisions are “derived from Alice’s Adventures in Wonderland”).

19. *Compare Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (holding that the proper policy pursuant to the Establishment Clause is “strict neutrality, neither aiding nor opposing religion”), and Geoffrey R. Stone et al., *THE FIRST AMENDMENT 517* (1999) (explaining that advocates of strict neutrality believe that religious institutions must fulfill secular criteria in order to lawfully benefit from government action or inaction), with *Wallace v. Jaffree*, 472 U.S. 38, 92–108 (1985) (Rehnquist, J., dissenting) (arguing that the Establishment Clause does not “prohibit the Federal Government from providing nondiscriminatory aid to religion”), and Stone, *supra* note 19, at 518 (stating that advocates of benevolent neutrality believe that government may assist religion provided it does so equitably among all religions).

20. *Compare Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (declaring that Establishment Clause was not incorporated against states by Fourteenth Amendment), and Akhil Reed Amar, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 227* (1998) (making case against incorporation on strength of historical reading of Establishment Clause), with *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (holding that Establishment Clause applies against states), and William K. Leitzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1210 (1990) (“While many specific Bill of Rights incorporations have been criticized, none are so thoroughly contradicted by the historically discernible intentions of our forefathers than that of the establishment clause.”).

of which is indispensable to a working understanding of the Establishment Clause—have conspired to exacerbate these prevailing ambiguities: (1) religion; (2) an established church; and (3) an establishment of religion. Of these three, the easiest to define may be an *established church*. The most difficult may be the term *religion*.

A. Religion

Defining the term *religion* is no easy task.²¹ Yet it is a necessary condition to fashioning principled establishment jurisprudence. One scholar offers three reasons why it is necessary for courts to come to grips with this complex subject. First, the court must define religion “because it determines what is protected and what is not.”²² Moreover, such a definition “permit[s] an answer as to whether such diverse beliefs as Confucianism, political philosophy, Marxism, Communism, belief in GNP, being a millionaire, and even atheism, are, in fact, religions.”²³ Finally, the most compelling reason is that the Constitution demands nothing less:

[T]he Constitution itself requires that we provide a definition. It protects the free exercise and prohibits establishment of something called “religion.” In adjudicating Commerce Clause cases, courts define “commerce.” Similarly, in adjudicating Due Process cases, courts define “life,” “liberty,” and “property.” There is no reason to think that the procedure should be different for the First Amendment.²⁴

Dictionaries and encyclopedias have readily reduced this notion to its least common denominator, something surely remarkable given that religion—which remains largely unknowable and impenetrable—is so central to most human lives. There appear to be two common elements to these definitions of religion: (1) belief in the existence of a larger force; and (2) adherence to a code of human conduct.

One dictionary defines religion as “[a] system of faith and worship usually involving belief in a supreme being and usually

21. See Rex Ahdar & Ian Leigh, RELIGIOUS FREEDOM IN THE LIBERAL STATE 110–25 (2005).

22. Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309, 314 (1994).

23. *Id.* at 314–15 (citations omitted).

24. *Id.* at 315–16 (citations omitted).

containing a moral or ethical code.”²⁵ Another defines it as “belief in a reverence for a supernatural power or powers regarded as creator and governor of the universe; a personal or institutionalized system grounded in such belief and worship.”²⁶ Religion has also been defined in the following three ways: (1) as “recognition on the part of man of some higher unseen power as control of his destiny, and as being entitled to obedience, reverence, and worship; the general mental and moral attitude resulting from this belief, with reference to its effect upon the individual or the community”;²⁷ (2) as “a set of beliefs concerning the cause, nature, and purpose of the universe, [especially] when considered as the creation of a superhuman agency or agencies, usually involving devotional and ritual observances, and often containing a moral code governing the conduct of human affairs”;²⁸ and (3) as “a system of beliefs about reality, existence, the universe, the supernatural or the divine and practices arising out of these beliefs.”²⁹ Similar definitions have been echoed elsewhere.³⁰

25. BLACK’S LAW DICTIONARY 1293–94 (7th ed. 1999).

26. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1474 (4th ed. 2000).

27. XIII OXFORD ENGLISH DICTIONARY 568–69 (2d ed. 1989).

28. RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1628 (Stuart Berg Flexner ed., 2001).

29. INTERNATIONAL DICTIONARY OF RELIGION 155 (Richard Kennedy ed., 1984).

30. See, e.g., MERRIAM-WEBSTER ENCYCLOPEDIA OF WORLD RELIGIONS 915–16 (1999) (defining religion as “a system of communal belief and practices relative to superhuman beings”); HARPERCOLLINS DICTIONARY OF RELIGION 893 (Jonathan Z. Smith ed., 1995) (defining religion as “a system of beliefs and practices that are relative to superhuman beings”); IX NEW ENCYCLOPEDIA BRITANNICA 1016 (15th ed. 1995) (defining religion as “human beings’ relation to that which they regard as holy, sacred, spiritual, or divine”); COLUMBIA ENCYCLOPEDIA 2300 (Barbara A. Chernow & George A. Vallasi eds., 5th ed. 1993) (defining religion as “a system of thought, feeling, and action that is shared by a group and that gives the members an object of devotion; a code of behavior by which individuals may judge the personal and social consequences of their actions; and a frame of reference by which individuals may relate to their group and their universe”); WEBSTER’S NEWWORLD ENCYCLOPEDIA 939 (9th rev. ed. 1992) (defining religion as a “code of belief or philosophy, which often involves the worship of a God or gods”); COLLINS ENGLISH DICTIONARY 1309 (3d ed. 1991) (defining religion as a “belief in, worship of, or obedience to a supernatural power or powers considered to be divine or to have control of human destiny; any formal or institutionalized expression of such belief; the attitude and feeling of one who believes in a transcendent controlling power or powers”); RANDOM HOUSE ENCYCLOPEDIA 2525 (James Mitchell ed., 1977) (defining religion as a “particular system of beliefs and resulting practices stimulated by some awareness of a supreme being or power”); AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 54–55 (2d prt. 1970) (defining religion as “includ[ing] a belief in the being and perfections of God, in the

Framing a theoretical definition of religion is one thing, but piecing together an applicable one is quite another. The great difficulty in devising a workable meaning—one that may be applied as a baseline against the realities of both mundane and peculiar human interactions that give rise to legal disputes—helps explain why courts have yet to articulate a viable definition of religion. The United States Supreme Court has generally described the notion of religion in expansive and innocuous phrases: “the term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”³¹ The Court has also stated that “[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”³² Lower courts have offered more specificity in defining religion although their efforts are, likewise, mostly sweeping generalizations that remain of little use to resolving legal disputes.³³

Perhaps recognizing the peril and intricacy involved in delimiting the four corners of religion, the Supreme Court has instead chosen to cultivate a policy of deference to assertions of religious belief. The controlling signpost in this respect affirms that the Court must refrain from passing judgment upon the validity of a religious belief, so long as the belief is articulated with sincerity.³⁴ This rule applies with the same force to constrain

revelation of his will to man, in man’s obligation to obey his commands, in a state of reward and punishment, and in man’s accountableness to God; and also true godliness or piety of life, with the practice of all moral duties”); XII CATHOLIC ENCYCLOPEDIA 739 (1909) (defining religion as “the voluntary subjection of oneself to God”).

31. *Davis v. Beason*, 133 U.S. 333, 342 (1890), *abrogated by* *Romer v. Evans*, 517 U.S. 620 (1996).

32. *United States v. Macintosh*, 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting), *overruled in part by* *Girouard v. United States*, 328 U.S. 61 (1946).

33. *See, e.g., Altman v. Bedford Cent. Sch. Dist.*, 45 F. Supp. 2d 368, 378 (S.D.N.Y. 1999) (“First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.”); *Africa v. Horn*, 998 F. Supp. 557, 559 (E.D. Pa. 1998) (“The general indicia of a religion include a comprehensive belief system which addresses fundamental questions regarding life and morality and which has formal signs or structural characteristics such as ceremonies, observances and organization. It consists of more than isolated teachings or ideas, however sincerely committed one may be to them.”).

34. *United States v. Seeger*, 380 U.S. 163 (1965) (holding that the judiciary may not inquire into the veracity or reasonableness of a religious belief).

the actions of government. Thus, although some "might be tempted to question the existence of . . . [a] 'Supreme Being' or the truth of his concepts," explains the Court, such questions "are inquiries foreclosed to Government."³⁵ Indeed, all inquiries into the truth, validity, or reasonableness of religious beliefs are beyond the permissible reach of the state,³⁶ just as "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."³⁷

It may be that any functional definition of religion is doomed to either over- or under-inclusiveness,³⁸ but this has not discouraged scholars from venturing into the fray.³⁹ For James Donovan, for instance, the best definition of religion is a "generative functional one," which leads him to suggest that religion is "any belief system which serves the psychological function of alleviating death anxiety."⁴⁰ The Supreme Court has evolved its understanding of religion in at least four steps, writes Donovan, beginning with the belief-action dichotomy unveiled in *Reynolds v. United States*,⁴¹ an 1878 case upholding a polygamy conviction, followed by the sincerity test in *United States v.*

35. *Id.* at 184. See also *United States v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995), *cert. denied*, 522 U.S. 1006 (1997) ("The first [proposition] is that one man's religion will always be another man's heresy. The Court will not, therefore, find that a particular set of beliefs is not religious because it disagrees with the beliefs. Nor will the Court find that a particular set of beliefs is not religious because the beliefs are, from either the Court's or society's perspective, idiosyncratic, strange, solipsistic, fantastic, or peculiar. The second proposition is that if there is any doubt about whether a particular set of beliefs constitutes a religion, the Court will err on the side of freedom and find that the beliefs are a religion. In a country whose founders were animated in large part by a desire for religious liberty, to do otherwise would ignore a venerable (albeit checkered) history of freedom and tolerance.") (citations omitted).

36. *United States v. Ballard*, 322 U.S. 78, 87 (1944), *rev'd*, 329 U.S. 187 (1946).

37. *Thomas v. Rev. Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

38. See Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1423-31 (1967).

39. See, e.g., Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989); Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Val D. Ricks, *To God God's, To Caesar Caesar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053 (1993).

40. James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion"*, 6 SETON HALL CONST. L.J. 23, 95 (1995).

41. 98 U.S. 145 (1878).

Ballard,⁴² the individual mental structure test in *United States v. Seeger*,⁴³ and finally the psychological positioning test in *Welsh v. United States*.⁴⁴ Another scholar stops short of defining religion, cautioning that perhaps "only the individual can define religion in a manner wholly satisfactory to that individual."⁴⁵ In this respect, the challenge for the judiciary is to recognize that practically anything may be given religious import, particularly in light of the relocation of religious believers' convictions from once exclusively moored in faith to now at least partly tethered in culture:

[N]othing is intrinsically secular. Anything whatsoever can be given religious meaning and purpose: cooking, planting, war, medicine, commerce, play, and politics. In an integral culture, these activities are not just governed by religion; they are the religion itself. They are the very ways in which people make contact with powers which are beyond the ordinary. This is a challenge for our courts, which should see that we are all allowed to follow our traditions so far as this can be reconciled with our living together.⁴⁶

B. Established Church

Dictionaries and encyclopedias generally agree on the meaning of an established church. One defines it as "the church as by law established in any country, as the public or state-recognized form of religion."⁴⁷ Another reads the term to mean a "church that a government officially recognizes as a national institution and to which it accords support."⁴⁸ Yet another defines it as a "church that is recognized by law, and sometimes financially supported, as the official church of a nation."⁴⁹ Still another defines an established church as a "church that is officially recognized as a national institution."⁵⁰ Others offer similar explications.⁵¹ Yet

42. 322 U.S. 78, 87 (1944), *rev'd*, 329 U.S. 187 (1946).

43. 380 U.S. 163, 176-77 (1965).

44. 398 U.S. 333, 339-40 (1970).

45. C. John Sommerville, *Defining Religion and the Present Supreme Court*, 6 U. FLA. J.L. & PUB. POL'Y 167, 169 (1994).

46. *Id.* at 171.

47. III OXFORD ENGLISH DICTIONARY 201 (2d ed. 1989).

48. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 609 (4th ed. 2000).

49. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 663 (Stuart Bert Flexer ed., 2001).

50. COLLINS ENGLISH DICTIONARY 531 (3d ed. 1991).

perhaps the simplest definition of an established church is also the clearest: a “church[] enjoying privileged status.”⁵² It is not until the focus turns from the narrow phrase “established church” to the broader notion of “establishment” (as in an establishment of religion), that it becomes difficult to reach agreement.⁵³

C. *Establishment of Religion*

The concept of establishment is commonly accepted as an “ecclesiastical system established by law”⁵⁴ in which “[t]he union of Church and State set[s] up a definite and distinct relation between the two.”⁵⁵ The United States Supreme Court has weighed in on the term on several occasions, most notably sixty years ago.⁵⁶ In its first pronouncement on the meaning of the incorporated Establishment Clause—a declaration that remains, even now, its most influential on the scope of the Establishment

51. See, e.g., MERRIAM-WEBSTER ENCYCLOPEDIA OF WORLD RELIGIONS 334 (1999) (defining the term as “a church recognized by law as the official church of a state or nation and supported by civil authority. The church is not free to make changes in such things as doctrine, order, or worship without the consent of the state. In accepting such obligations, the church usually, though not always, receives financial support and other special privileges.”); OXFORD DICTIONARY OF WORLD RELIGIONS 319 (John Westerdale Bowker ed., 1997) (defining the term as “[a]ny church recognized by state law as the official religion of a country”); IV NEW ENCYCLOPEDIA BRITANNICA 567 (15th ed. 1995) (defining the term as “a church recognized by law as the official church of a state or nation and supported by civil authority”); INTERNATIONAL DICTIONARY OF RELIGION 68 (Richard Kennedy ed., 1984) (defining the term as a “denomination that enjoys a particularly privileged position within a country such as the Anglican Church within England or the Lutheran Church in Denmark”); CONCISE DICTIONARY OF AMERICAN HISTORY 344 (David William Voorhees ed., 1983) (defining the term as a “[c]hurch[] supported by tax funds or by direct grants of aid”); ABINGTON DICTIONARY OF LIVING RELIGIONS 240 (Keith Crim ed., 1981) (defining the term as “any church recognized by civil law as the official religion of a country or region”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 778 (Philip Babcock Gove ed., 1971) (defining the term as “a church that is recognized by law as the official church of a nation, that is supported by civil authority, and that receives in most instances financial support from the government through some system of taxation”); V CATHOLIC ENCYCLOPEDIA 548 (1909) (defining the term as “a distinctive name for the ecclesiastical system established by law”).

52. DICTIONARY OF CHRISTIANITY IN AMERICA 401 (Daniel G. Reed ed., 1990).

53. See Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom?*, 49 McGill L.J. 635, 638–48 (2004).

54. V OXFORD ENGLISH DICTIONARY 405 (2d ed. 1989).

55. V CATHOLIC ENCYCLOPEDIA 548 (1909).

56. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

Clause⁵⁷—the Court defined an establishment of religion to a degree of specificity that would impress the most dutiful legislators:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”⁵⁸

This passage reads like a statute, outlining a rough sketch of the types of activities public bodies and officials must refrain from undertaking in order to remain squarely within the lawful bounds of the Establishment Clause. According to the *Everson* Court, the Establishment Clause forbids governments from designating an official church or religion, compelling church attendance, dictating religious belief, endorsing religion or the religious, imposing taxes in support of religion or the religious, and sharing a role in the governance of religious institutions. Armed with such a detailed crib sheet—and setting aside whether the Court should have even ventured beyond its proper minimalist role to issue such exhaustive

57. Several lower federal and state courts have relied on the Court's *Everson* ruling to decide the establishment issues before them. See, e.g., *Gentala v. City of Tucson*, 213 F.3d 1055, 1066 (9th Cir. 2000), *vacated*, 534 U.S. 946 (2001); *Kerr v. Farrey*, 95 F.3d 472, 476 (7th Cir. 1996); *Kreisner v. City of San Diego*, 988 F.2d 883, 888 (9th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994); *Altman v. Bedford Cent. Sch. Dist.*, 45 F. Supp. 2d 368, 375 (S.D.N.Y. 1999), *rev'd in part, vacated in part*, 245 F.3d 49 (2d Cir.), *cert. denied*, 534 U.S. 827 (2001); *Amancio v. Town of Somerset*, 28 F. Supp. 2d 677, 678 (D. Mass. 1998); *Stark v. Indep. Sch. Dist. No. 640*, 938 F. Supp. 544, 549 (D. Minn. 1996), *rev'd*, 123 F.3d 1068 (8th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Williams v. Lara*, 52 S.W.3d 171, 186 (Tex. 2001); *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 483 (Tenn. 1997).

58. *Everson*, 330 U.S. at 15–16.

instructions to public officers⁵⁹—it is perhaps inexplicable that the Court's modern understanding of what constitutes an establishment of religion has been so patently uneven since *Everson*.

III. MODERN ESTABLISHMENT DOCTRINE

Perhaps as a result of the difficulty in defining the terms religion, established church, and establishment, contemporary establishment jurisprudence has been nothing if not incoherent. A certain measure of inconsistency is expected from all public institutions, even the august deliberative body that is America's highest Court. It is an inevitable consequence of changing social contexts and rotating personnel, both of which conspire with the Court's limited docket and judicial resources to create the perfect storm. Perhaps with more time and resources, the Court could conceivably tie up all of the loose ends in its expansive corpus of cases.⁶⁰ But even acknowledging that the Court's decisions will

59. Chicago law and political science scholar Cass Sunstein has developed a persuasive theory of judicial minimalism, which urges the judiciary to decide cases on narrow grounds, discourage clear rules, and avoid final definitive resolution of constitutional matters. See Cass R. Sunstein, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 26–37, 259–63 (1999). His theory furthers the interest of participatory democracy insofar as it encourages the judiciary to promote democratic deliberation among the people and in the legislatures. *Id.*

60. According to scholars, there are several areas of law in need of urgent attention, including: (1) sovereign immunity, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1480 (1987) (“It is no wonder the Court’s Eleventh Amendment case law is incoherent; in law, as in logic, anything can be derived from a contradiction. All we are left with is an *ad hoc* mishmash of *Young* and *Edelman*, of full remedy and state sovereignty, of supremacy and immunity, of law and lawlessness. The icon of the federal courthouse open to remedy all constitutional wrongs gives way to a burlesque image of a doctrinal obstacle course on the courthouse steps.”); (2) takings, see Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993) (“Throughout constitutional jurisprudence, only the right of privacy can compete seriously with takings law for the doctrine-in-most-desperate-need-of-a-principle prize.”); (3) separation of powers, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991) (“Unanimity among constitutional scholars is all but unheard of. Perhaps when achieved it should be celebrated. But one point on which the literature has spoken virtually in unison is no cause for celebration: the Supreme Court’s treatment of the constitutional separation of powers is an incoherent muddle.”); (4) preemption, see Thomas A. Barnico, *The Road from Burma: State Boycotts After Crosby v. National Foreign Trade Council*, 19 B.U. INT’L L.J. 89, 102 (2001) (“The proper presumption (if any) against or in favor of preemption will grow in importance with the rise of global trade and trade agreements. Many more state and local laws will touch on foreign affairs in the future, through selective purchasing, divestment, and the regulation and taxation of international trade. The Supreme Court will

not be seamless in any area of the law, establishment jurisprudence appears to at least equal if not surpass all others in its incoherence. This is evident when surveying case law on varied establishment issues, such as the use of public funds for religious instruction, the display of religious symbols and, among others, the appropriation of funds from general revenues to religious institutions.

eventually need to resolve the proper standard of review for claims of preemption in this important area.”); (5) interstate commerce, see S. Mohsin Reza, Comment, *DaimlerChrysler v. Cuno: An Escape from the Dormant Commerce Clause Quagmire?*, 40 U. RICH. L. REV. 1229, 1238 (2006) (describing dormant Commerce Clause case law and stating that “it is necessary to analyze the Supreme Court’s jurisprudence in the area of discrimination and the dormant Commerce Clause, a field of law that has been, perhaps justifiably, described as a ‘mess’ and a ‘quagmire’”); (6) jurisdiction, see Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT’L L. 111, 117 (1998) (“The American delegation is also in an unenviable position because American jurisdictional law is simply not fit for export In contrast to not only civil law nations but also other common law countries, to this day we lack a rational catalog of jurisdictional bases In consequence of well over a century of experimentation and vacillation, we are stuck with a confused, unwieldy and, at times, unfair Supreme Court case law Instead of reasonably clear and cogent provisions, as they are found throughout the civilized world, we rely on a jumble of state long-arm statutes and Supreme Court case law that is chaotic and incoherent.”) (citations omitted); (7) maritime jurisdiction, see Lawrence D. Bradley, Jr., *The Supreme Court and Maritime Jurisdiction*, 25 TUL. MAR. L.J. 207, 244 (2000) (“The Supreme Court could easily work itself out from under ‘the mess’ it has created, and the sooner it does the better.”); (8) public assistance benefits, see Charles R. Bogle, Note, *“Unconscionable” Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits*, 94 COLUM. L. REV. 193, 195 (1994) (“In addition, the case law on this issue is notoriously incoherent; the standards the Supreme Court claims to be using when evaluating restrictive conditions escape easy definition and are not applied uniformly across cases involving different types of assistance or rights. In an area of the law of such crucial importance to the recipients of the assistance, the Court’s doctrine cries out for clarification.”); (9) environment, see Mary Jane Angelo, *Embracing Uncertainty, Complexity, and Change: An Eco-Pragmatic Reinvention of a First-Generation Environmental Law*, 33 ECOLOGY L.Q. 105, 202 (2006) (“Ironically, if any area of environmental law should be tailored specifically to address ecological concerns, it is pesticide law, where substances intended to kill and disrupt species and natural systems are intentionally released into the environment in large quantities. Moreover, pesticide law has failed to keep pace with recent advances in ecology and conservation biology.”); and among others (10) antitrust, see Robert H. Klonoff, *Antitrust Class Actions: Chaos in the Courts*, 11 STAN. J.L. BUS. & FIN. 1, 26 (2005) (“The deep conflicts described in this article have persisted for many years, and it is highly unlikely that the lower courts will resolve these conflicts on their own. Ultimately, the Supreme Court will need to resolve these issues.”).

A. The Establishment Labyrinth

Consider a brief journey through the establishment labyrinth. According to the Court's jagged establishment jurisprudence on the appropriation of state funds for religious instruction, it is an impermissible establishment of religion for the state to reimburse parents for a portion of expenses incurred for their children's tuition expenses at religious schools,⁶¹ just as it is to give an annual tax break to parents whose annual income exceeds the eligibility criteria for tuition reimbursement.⁶² On the other hand, it does not constitute an establishment of religion for a state either to absorb tuition charges for students attending religious schools⁶³ or to authorize income tax deductions for tuition, textbook, and transportation expenses incurred by parents in sending their children to religious schools.⁶⁴

Also in the field of denominational instruction, the Court has both approved⁶⁵ and invalidated⁶⁶ a "released time" program allowing public school students to attend religious instruction conducted by private teachers. It appears that such a program may simultaneously constitute and not constitute an unlawful establishment of religion. Likewise, the Court has both approved⁶⁷ and invalidated⁶⁸ a state program authorizing the use of federal funds to place public school teachers and social workers in parochial schools to teach courses in remedial reading, remedial mathematics, and to administer guidance services and English as a second language.

Yet the Court has left no doubt that a statute forbidding public schools from teaching the theory of evolution is an establishment of religion,⁶⁹ just as it would be an impermissible establishment of religion to create a special school district for a religious enclave.⁷⁰ It is not an establishment of religion, however, to extend state financial assistance to either a blind student attending a private

61. *Sloan v. Lemon*, 413 U.S. 825 (1973).

62. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

63. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

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

65. *Zorach v. Clauson*, 343 U.S. 306 (1952).

66. *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

67. *Agostini v. Felton*, 521 U.S. 203 (1997).

68. *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

69. *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

70. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

religious school in preparation for a career in religious ministry,⁷¹ or a deaf student in need of sign-language interpretation attending a denominational high school.⁷²

The Court's incoherent and seemingly arbitrary case law on the use of public funds for instructional material at religious schools also leaves observers pondering what precisely represents an impermissible establishment of religion. Consider that the Court has declared that it is *not* an impermissible establishment of religion for a state to provide government aid in the form of school materials and equipment to religious books.⁷³ But the Court has also said the very opposite—that it *is* an establishment of religion for a state to provide government aid in the form of school materials and equipment to religious schools.⁷⁴ Moreover, the Court has ruled that a state does not impermissibly establish a religion when it requires public school officials to loan textbooks free of charge to religious school students.⁷⁵ The Court has similarly undercut itself by creating a curious exception to this rule—that a state sometimes does *not* impermissibly establish a religion when it authorizes loans of textbooks and instructional materials to religious students.⁷⁶

Administrative matters have also presented a difficulty for the Supreme Court. Consider that it is not an establishment of religion for a state to ensure, through an auditing process, that denominational schools have been reimbursed only for the actual costs of administering secular services.⁷⁷ Yet the Court has invalidated as an establishment of religion a state program reimbursing denominational schools for expenses incurred in performing administrative functions, such as maintaining and reporting records on student enrollment.⁷⁸ The Court has also stated that it is an establishment of religion to reimburse denominational schools for keeping student records and administering certain tests, both of which were requirements pursuant to state law.⁷⁹ Thus, curiously, it is an establishment of

71. *Witters v. Wash. Dep't of Serv. for the Blind*, 474 U.S. 481 (1986).

72. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

73. *Mitchell v. Helms*, 530 U.S. 793 (2000).

74. *Wolman v. Walter*, 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

75. *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

76. *Meek v. Pittenger*, 421 U.S. 349 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

77. *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

78. *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973).

79. *New York v. Cathedral Acad.*, 434 U.S. 125 (1977).

religion to reimburse denominational schools for administering secular services, but it is not an establishment of religion to audit reimbursements to denominational schools for administering secular services—the very form of reimbursements that the Court has identified as an establishment of religion. It is equally peculiar that religious schools may be subject to state registration and reporting requirements, but religious organizations are shielded from such requirements because subjecting them to administrative requirements similar to the ones imposed upon religious schools would create an establishment of religion.⁸⁰

With respect to religious symbols, it is an unlawful establishment of religion for a state to require the Ten Commandments to hang on public school classroom walls.⁸¹ It is also an establishment of religion for a city to feature a crèche display to commemorate Christmas,⁸² but it is not an establishment of religion for a city to erect a nativity scene to celebrate Christmas.⁸³

Government grants are an equally inconsistent segment of establishment jurisprudence. Although religious high schools may not be reimbursed for the cost of administering secular services required by the state because doing so would give rise to an establishment of religion, religious colleges and universities may duly receive state administrative and other assistance in issuing revenue bonds for fundraising purposes without incurring the risk of establishing a religion.⁸⁴ Religious institutions of higher education may also lawfully apply for and obtain federal construction grants.⁸⁵ But, when a state disburses an annual grant to all schools based upon student enrollment, religious schools may not be credited for enrolling students in a seminarian or theological program because that would constitute an unconstitutional establishment of religion.⁸⁶

With respect to taxes, it is an impermissible establishment of religion to exempt religious periodicals from sales tax,⁸⁷ but it is not an impermissible establishment of religion when property tax exemptions are granted to properties used for religious worship.⁸⁸

80. *Larson v. Valente*, 456 U.S. 228 (1982).

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

82. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

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

84. *Hunt v. McNair*, 413 U.S. 734 (1973).

85. *Tilton v. Richardson*, 403 U.S. 672 (1971).

86. *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976).

87. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

88. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970).

This review is not to suggest that the Court's entire repertoire of establishment decisions is filled with inconsistencies. On the contrary, the Court has spoken in one melodious voice on several establishment issues. For instance, with respect to the delegative powers of religious institutions, the Court has decidedly held that it is an establishment of religion to authorize a church to exercise what amounts to a veto that blocks a business from receiving a liquor license if it is located within a 500-foot radius of the objecting church.⁸⁹ There is similarly no ambiguity as to what is or is not an establishment of religion when it comes to Sabbath observance. Where a state legislates that employees may refuse for religious purposes to work on their chosen day of rest, there is no question, according to the Court, that such a statute rises to the level of an impermissible establishment of religion.⁹⁰

Likewise, contrary to the muddled waters traversed above on the subject of state reimbursements relating to religious schools—whether the reimbursement takes the form of vouchers, tax exemptions, or otherwise—calm waters await those who would navigate the Court's jurisprudence on school transportation expenses for denominational schools. For instance, the Establishment Clause permits a state to reimburse parents from public funds for the cost of sending their children by bus to religious schools.⁹¹ It is, likewise, tolerable for a state to authorize public assistance to religious schools for transportation on field trips.⁹²

Furthermore, no such ambiguity prevails on school prayer and religious invocations. It is an establishment of religion to expect public school students to recite aloud a morning prayer,⁹³ just as it is to insist on Bible readings at the opening of the school day.⁹⁴ Moreover, public school teachers cannot hold a one-minute period of silence for voluntary student prayer because that would create an establishment of religion.⁹⁵ Even permitting student-initiated and student-led prayer before high school athletic contests risks establishing a religion.⁹⁶ It should thus come as no surprise that an establishment of religion would follow were a public school principal to invite a rabbi to deliver a commencement prayer.⁹⁷

89. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

90. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

91. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

92. *Mitchell v. Helms*, 530 U.S. 793 (2000).

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

94. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

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

96. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

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

Similarly, under the Court's establishment jurisprudence on access to public facilities for religious purposes, what constitutes an establishment of religion is not as ambiguous as other establishment issues. For instance, it is not an establishment of religion for a public university to allow registered religious student groups to use its facilities.⁹⁸ Nor is it an establishment of religion for district residents to use school district buildings for religious activities, including Bible lessons and prayer.⁹⁹

B. The Establishment Edifice

What emerges from this survey of establishment jurisprudence is an uninspiring portrait of the wobbly constitutional edifice erected in part by the Supreme Court. It would be unfair to characterize the Court's establishment case law as unprincipled. It is not. The conflicted case law is instead the result of the Court's valiant efforts over the years to distinguish and reconcile divergent state constitutional provisions on religion and establishment precedent from the founding era—constitutional provisions and precedent that are often diametrically opposed to *themselves*. The Court's early pronouncements on the Establishment Clause came at a time of uncertainty about the proper role of religion in the public square. The new nation—and also the Court, which of course was not insulated from the national current—had not yet resolved whether religion and religious conviction in the public square was something to embrace or eschew.

Specifically, it could not be said whether it was more prudent to protect the public square from the prospect of divisive religious beliefs—which could work irreparable harm upon the impressionable young nation—or to foster open discourse in the public square among and between peoples of different faith traditions, which, quite apart from their dissimilar means and ends, share in common the language of peace and could conceivably unite divergent faith traditions. Both strands of this issue have survived to the present day, and continue to inform the Court's establishment jurisprudence. Had the Court managed to square these two views in its early jurisprudence, perhaps the Establishment Clause—and indeed American constitutional law—would have been better served as a matter of predictable lawmaking and constitutional interpretation.

98. *Agostini v. Felton*, 521 U.S. 203 (1997).

99. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

IV. EARLY ESTABLISHMENT HISTORY

As it stands, establishment history—and, as a result, establishment jurisprudence—is unsettled. Scholars have argued in an equally persuasive manner in favor of two conflicting theses: (1) the founders intended to strictly separate religion from the mechanisms of the state; and (2) the founders were a deeply religious people who believed that religion and government should work symbiotically to advance the aims of the new nation.¹⁰⁰ This disputed and disputable history of the Establishment Clause may certainly be one source of the current establishment labyrinth.¹⁰¹ But the unevenness of modern establishment jurisprudence is perhaps more squarely the product of a correspondingly uneven process of disestablishment in the several states during the late eighteenth and early nineteenth centuries. Disestablishment is the eradication of religious preferences¹⁰² or, more narrowly, disentangling the religious from public authorities.¹⁰³ When the original thirteen American colonies enshrined the principle of disestablishment in their respective state constitutions, many of them still retained a distinctly religious spirit, not only in form, but also in fact. In the first section below, I review the process of disestablishment in the states to show that religion was never really removed from the public sphere. In the second section to follow, I demonstrate that the Supreme Court's early establishment case law

100. Compare Patrick M. Garry, *The Myth of Separation: America's Historical Experience with Church and State*, 33 HOFSTRA L. REV. 475, 476–78 (2004) (arguing that religion was viewed as indispensable to effective civil government), with Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 14-3, 14-4 (1978) (arguing that framers intended to separate church from state in order to ensure effectiveness of civil government).

101. John E. Joiner, Note, *A Page or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 DENV. U. L. REV. 507, 507 (1996) ("Nonetheless, history may be as poor a barometer of the Clause's intended scope as are the Court's inconsistent decisions. Indeed, the history of the Establishment Clause is not only confusing, but mired in minutiae and readily manipulated. Unwary jurists consistently fall prey to its simple deceptiveness and overlook its unquantifiable complexity. The ominous result is an Establishment Clause jurisprudence which is one-sided and distorted, a jurisprudence without substance and historical support.").

102. E.g., Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 557 n.28 (1998); Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 CUMB. L. REV. 247, 252 n.30 (1995).

103. Mark D. McGarvie, *Creating Roles for Religion and Philanthropy in a Secular Nation: The Dartmouth College Case and the Design of Civil Society in the Early Republic*, 25 J.C. & U.L. 527, 529 (1999).

mirrored the reluctance of the former colonies to fully and actually separate church from state.

A. Disestablishment in the Several States

Most of the American colonies exhibited establishmentarian features during the revolutionary era¹⁰⁴ and into the period of constitutional ratification.¹⁰⁵ But, the American declaration of independence from the British Crown triggered a gradual movement toward disestablishment, beginning with four colonies in 1776, and one each in 1777 and 1786.¹⁰⁶ The United States Bill of Rights accelerated the pace of disestablishment through 1833, the year when the last American state officially ended its constitutional culture of religious preferences.¹⁰⁷ What emerges from a review of disestablishment in the several states is that the process of actual disestablishment was rarely ever complete.¹⁰⁸ Indeed, even after official disestablishment by constitutional amendment, there often remained vestiges of establishment in the states' respective constitutional instruments.¹⁰⁹

Consider first the four states that officially disestablished religion in 1776: Maryland, New Jersey, North Carolina, and Delaware. Maryland established the Church of England in 1702,¹¹⁰ but later disestablished the Church in its Constitution of 1776.¹¹¹ Maryland's 1776 Constitution officially ordered the separation of church and religious authorities, while at the same time guaranteed religious liberty only to Christians and authorized the Maryland state legislature to impose a tax in support of Christianity.¹¹² Both of these provisions lay to bare the enduring

104. Levy, *supra* note 6, at 1.

105. Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2351 (1997) (explaining that established churches had become "features of the American landscape" in the late eighteenth century).

106. See *infra* Part IV.A.

107. *Id.*

108. *Id.*

109. *Id.*

110. See Michael S. Ariens & Robert A. Destro, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 58 (1996).

111. Sanford H. Cobb, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 504 (2d prtg. 1970).

112. MD. CONST. of 1776, art. XXXIII:

That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his

vestiges of the state's official sanction of the Church of England. Indeed, despite purporting to disestablish Christianity in 1776, Maryland's Constitution limited public office to those who declared a belief in the Christian religion:

That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion.¹¹³

A similar disconnect is discernible in New Jersey. The state is said to have preserved religious liberty for its citizens at all times.¹¹⁴ It also freely extended to its citizens the freedom of religion and conscience,¹¹⁵ and forbade any establishment of

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 or morality, or injure others, in their natural, civil, or religious rights; nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry; yet the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister; or for the benefit of the poor of his own denomination, or the poor in general of any particular county: but the churches, chapels, glebes, and all other property now belonging to the church of England, ought to remain to the church of England forever. And all acts of Assembly, lately passed, for collecting moneys for building or repairing particular churches or chapels of ease, shall continue in force, and be executed, unless the Legislature shall, by act, supersede or repeal the same: but no county court shall assess any quantity of tobacco, or sum of money, hereafter, on the application of any vestry-men or church-wardens; and every incumbent of the church of England, who hath remained in his parish, and performed his duty, shall be entitled to receive the provision and support established by the act, entitled "An act for the support of the clergy of the church of England, in this Province," till the November court of this present year, to be held for the county in which his parish shall lie, or partly lie, or for such time as he hath remained in his parish, and performed his duty.

113. *Id.* art. XXXV.

114. *See* Ariens & Destro, *supra* note 110, at 58.

115. N.J. CONST. of 1776, art. XVIII:

That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, under any pretence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever

religion in its constitution.¹¹⁶ But the New Jersey Constitution did impose a religious test for public office that limited office-holding to Protestants.¹¹⁷ This test survived well into the nineteenth century.¹¹⁸

The same inconsistency is evident in early North Carolina, which established the Church of England in 1711.¹¹⁹ The Constitution of 1776 extended religious freedom to all North Carolinians, stating "[t]hat all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences."¹²⁰ It also prohibited an establishment of religion.¹²¹ But the virtue of these proscriptions was undermined

be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.

116. *Id.* art. XIX:

That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.

117. *Id.*

That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.

118. N.J. CONST. of 1844, art. I, § 4 ("There shall be no establishment of one religious sect in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right merely on account of his religious principles.").

119. See Ariens & Destro, *supra* note 110, at 59.

120. N.C. CONST. of 1776, art. XIX.

121. *Id.* art. XXXIV:

That there shall be no establishment of any one religious church or denomination in this State, in preference to any other; neither shall any person, on any pretence whatsoever, be compelled to attend any place of worship contrary to his own faith or judgment, nor be obliged to pay,

by the state's religious test for public office.¹²² The test was repealed much later in 1835.¹²³

Of these four early disestablishment states, Delaware is the exception because the state did not convey an ambiguous statement about the place of religion in public life. While Delaware's Charter of 1701 may have afforded religious liberty only to Christians,¹²⁴ its Constitution of 1776 did in fact impose a

for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all persons shall be at liberty to exercise their own mode of worship: —*Provided*, That nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses, from legal trial and punishment.

122. *Id.* art. XXXII:

That no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State.

123. *Id.* art. IV, § 4 (amended 1835).

124. CHARTER OF DELAWARE (1701). First:

BECAUSE no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship: And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare, That no Person or Persons, inhabiting In this Province or Territories, who shall confess and acknowledge *One* almighty God, the Creator, Upholder and Ruler of the World; and professes him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their religious Persuasion.

AND that all Persons who also profess to believe in *Jesus Christ*, the Saviour of the World, shall be capable (notwithstanding their other Persuasions and Practices in Point of Conscience and Religion) to serve this Government in any Capacity, both legislatively and executively, he or they solemnly promising, when lawfully required, Allegiance to the King as Sovereign, and Fidelity to the Proprietary and Governor, and taking the Attests as now established by the Law made at *Newcastle*, in the Year *One Thousand and Seven Hundred*, entitled, *An Act directing the Attests of several Officers and Ministers*, as now amended and confirmed this present Assembly.

Christian test on prospective officeholders.¹²⁵ However, Delaware's Constitution of 1792 eliminated religious tests¹²⁶ and reaffirmed disestablishment without any concomitant haziness.¹²⁷ Delaware was thus unmistakable in its intent to separate church from state.

The next four states to disestablish their respective churches were New York in 1777, Virginia in 1786, South Carolina in 1790, and Georgia in 1798. Whereas three of the first four colonies to disestablish—Maryland, New Jersey, and North Carolina—exhibited some traces of establishment, three of the colonies in this second foursome demonstrated a clearer commitment to disestablishment. Only one state in the second group—New York—sent conflicting signals about the state's official support or preference for a particular religious denomination.

New York's Church of England establishments were abolished in the New York Constitution of 1777.¹²⁸ The constitution did so in unmistakable terms, leaving no doubt as to the obsolete status of previous establishments under the new constitutional regime.¹²⁹

125. DEL. CONST. of 1776, art. 22:

Every person who shall be chosen a member of either house, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath, or affirmation, if conscientiously scrupulous of taking an oath, to wit:

"I, A B, will bear true allegiance to the Delaware State, submit to its constitution and laws, and do no act wittingly whereby the freedom thereof may be prejudiced."

And also make and subscribe the following declaration, to wit:

"I, A B, do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration."

And all officers shall also take an oath of office.

126. DEL. CONST. of 1792, art. I, § 2 ("No religious test shall be required as a qualification to any office, or public trust under this State.").

127. *Id.* art. I, § 1:

Although it is the duty of all men frequently to assemble together for the public worship of the Author of the universe, and piety and morality, on which the prosperity of communities depends, are thereby promoted; yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control, the rights of conscience, in the free exercise of religious worship, nor a preference be given by law to any religious societies, denominations, or modes of worship.

128. See Ariens & Destro, *supra* note 110, at 57.

129. N.Y. CONST. of 1777, art. XXXV:

New York also constitutionalized the right to religious freedom and broadly condemned religious intolerance.¹³⁰ But Catholics did not enjoy this expansive protection of religious liberty, as they

And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same. That such of the said acts, as are temporary, shall expire at the times limited for their duration respectively. That all such parts of the said common law, and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of Christians or their ministers, or concern the allegiance heretofore yielded to, and the supremacy, sovereignty, government, or prerogatives claimed or exercised by, the King of Great Britain and his predecessors, over the colony of New York and its inhabitants, or are repugnant to this constitution, be, and they hereby are, abrogated and rejected. And this convention doth further ordain, that the resolves or resolutions of the congresses of the colony of New York, and of the convention of the State of New York, now in force, and not repugnant to the government established by this constitution, shall be considered as making part of the laws of this State; subject, nevertheless, to such alterations and provisions as the legislature of this State may, from time to time, make concerning the same.

130. *Id.* art. XXXVIII:

And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *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.

were shunned across the state¹³¹ and effectively banned from holding public office until 1806.¹³²

By the time of the American Revolution, the Church of England was the established church in Virginia.¹³³ In 1776, Virginia adopted a bill of rights that guaranteed religious freedom, but, nonetheless, held Christianity in special regard.¹³⁴ Later, in 1779, Virginia repealed a law that had previously authorized state-subsidized salaries for Church of England clergy.¹³⁵ In 1786, the Virginia Assembly passed Thomas Jefferson's *Act Establishing Religious Freedom*, which officially disestablished the Church of England.¹³⁶

131. The New York Constitution of 1777 required prospective citizens to "abjure and renounce all allegiance and subjection to all and every foreign king, prince, potentate, and State in all matters, ecclesiastical as well as civil." *Id.* art. XLII. One scholar believes this provision to have been intended to discourage Catholics from settling in New York. Ariens & Destro, *supra* note 110, at 58 (quoting John Webb Pratt, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 95 (1967)).

132. Ariens & Destro, *supra* note 110, at 58.

133. *Id.* at 61.

134. VIRGINIA BILL OF RIGHTS of 1776, § 16:

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

135. Ariens & Destro, *supra* note 110, at 63.

136. AN ACT ESTABLISHING RELIGIOUS FREEDOM (1786):

Well aware that the opinions and belief of men depend on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to exalt it by its influence on reason alone; that the impious presumption of legislature and ruler, civil as well as ecclesiastical, 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, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular

For its part, South Carolina underwent a significant transformation between the American Revolution and the period of

pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; and therefore the proscribing any citizen as unworthy the public confidence by laying upon him incapacity of being called to offices of trust or emolument, unless he profess or renounce this or that religious opinion, is depriving him injudiciously of those privileges and advantages to which, in common with his fellow-citizens, he has a natural right; that it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminals who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that the 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 fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgement, and approve or condemn the sentiments of others only as they shall square with or suffer from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that 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.

We the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, or shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil liberties.

And though we well know that this Assembly, elected by the people for their ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operations, such act will be an infringement of natural right.

the drafting of the Bill of Rights. The 1778 Constitution of South Carolina established Christian Protestantism as the official religion.¹³⁷ But, in 1790, South Carolina adopted a new

137. S.C. CONST. of 1778, art. XXXVIII:

That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges. To accomplish this desirable purpose without injury to the religious property of those societies of Christians which are by law already incorporated for the purpose of religious worship, and to put it fully into the power of every other society of Christian Protestants, either already formed or hereafter to be formed, to obtain the like incorporation, it is hereby constituted, appointed, and declared that the respective societies of the Church of England that are already formed in this State for the purpose of religious worship shall still continue incorporate and hold the religious property now in their possession. And that whenever fifteen or more male persons, not under twenty-one years of age, professing the Christian Protestant religion, and agreeing to unite themselves In a society for the purposes of religious worship, they shall, (on complying with the terms hereinafter mentioned,) be, and be constituted a church, and be esteemed and regarded in law as of the established religion of the State, and on a petition to the legislature shall be entitled to be incorporated and to enjoy equal privileges. That every society of Christians so formed shall give themselves a name or denomination by which they shall be called and known in law, and all that associate with them for the purposes of worship shall be esteemed as belonging to the society so called. But that previous to the establishment and incorporation of the respective societies of every denomination as aforesaid, and in order to entitle them thereto, each society so petitioning shall have agreed to and subscribed in a book the following five articles, without which no agreement fir union of men upon presence of religion shall entitle them to be incorporated and esteemed as a church of the established religion of this State:

1st. That there is one eternal God, and a future state of rewards and punishments.

2d. That God is publicly to be worshipped.

3d. That the Christian religion is the true religion.

4th. That the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice.

5th. That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to the truth.

And that every inhabitant of this State, when called to make an appeal to God as a witness to truth, shall be permitted to do it in that way which is most agreeable to the dictates of his own conscience. And that the people of this State may forever enjoy the right of electing their own pastors or clergy, and at the same time that the State may have sufficient security for the due discharge of the pastoral office, by those who shall be admitted to be clergymen, no person shall officiate as

constitution, which abolished the state's establishment of the Christian Protestant religion.¹³⁸ The new constitution also decreed genuine freedom of religion for South Carolinians.¹³⁹

Georgia provides an example of "soft" establishment, which is the public support of religion alongside the promise of religious

minister of any established church who shall not have been chosen by a majority of the society to which he shall minister, or by persons appointed by the said majority, to choose and procure a minister for them; nor until the minister so chosen and appointed shall have made and subscribed to the following declaration, over and above the aforesaid five articles, viz: "That he is determined by God's grace out of the holy scriptures, to instruct the people committed to his charge, and to teach nothing as required of necessity to eternal salvation but that which he shall be persuaded may be concluded and proved from the scripture; that he will use both public and private admonitions, as well to the sick as to the whole within his cure, as need shall require and occasion shall be given, and that he will be diligent in prayers, and in reading of the same; that he will be diligent to frame and fashion his own self and his family according to the doctrine of Christ, and to make both himself and them, as much as in him lieth, wholesome examples and patterns to the flock of Christ; that he will maintain and set forwards, as much as he can, quietness, peace, and love among all people, and especially among those that are or shall be committed to lids charge. No person shall disturb or molest any religious assembly; nor shall use any reproachful, reviling, or abusive language against any church, that being the certain way of disturbing the peace, and of hindering the conversion of any to the truth, by engaging them in quarrels and animosities, to the hatred of the professors, and that profession which otherwise they might be brought to assent to. No person whatsoever shall speak anything in their religious assembly irreverently or seditiously of the government of this State. No person shall, by law, be obliged 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. But the churches, chapels, parsonages, globes, and all other property now belonging to any societies of the Church of England, or any other religious societies, shall remain and be secured to them forever. The poor shall be supported, and elections managed in the accustomed manner, until laws shall be provided to adjust those matters in the most equitable way.

138. See Ariens & Destro, *supra* note 110, at 60.

139. S.C. CONST. of 1790, art. VIII, § 1:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind: *Provided*, That the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

tolerance and pluralism.¹⁴⁰ In the case of colonial Georgia, the promise of religious tolerance and pluralism was qualified because all but Catholics enjoyed religious freedom under the Charter of 1732.¹⁴¹ The state established the Church of England in 1758,¹⁴² which was disestablished in 1777.¹⁴³ Yet in the same year, Georgia also imposed a Protestant test on elected officials.¹⁴⁴ A few years later, a Georgia statute revealed the extent to which Christianity remained dominant in civil society, stating that “the Christian religion redounded to the benefit of society, ‘its regular establishment and support is among the most important objects of legislative determination.’”¹⁴⁵ It was not until 1789 that the state expressly prohibited any establishment of religion.¹⁴⁶

The next three states to disestablish—Connecticut, New Hampshire, and Massachusetts—each appeared unable or unwilling to make a definitive break with its establishmentarian past. It was long after each state had officially discontinued ties

140. Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. REV. 1693, 1697–98 (2005).

141. CHARTER OF GEORGIA (1732):

And for the greater ease and encouragement of our loving subjects and such others as shall come to inhabit in our said colony, we do by these presents, for us, our heirs and successors, grant, establish and ordain, that forever hereafter, there shall be a liberty of conscience allowed in the worship of God, to all persons inhabiting, or which shall inhabit or be resident within our said province, and that all such persons, except papists, shall have a free exercise of their religion, so that they be contented with the quiet and peaceable enjoyment of the same, not giving offence or scandal to the government.

142. See Ariens & Destro, *supra* note 110, at 60.

143. GA. CONST. of 1777, art. LVI:

All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession.

144. *Id.* art. VI (“The representatives . . . shall be of the Protestant religion . . .”).

145. Thomas J. Curry, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 153 (1986).

146. GA. CONST. of 1798, art. IV, § 10:

No person within this State shall, upon any pretence, be deprived of the inestimable privilege of worshipping God in a manner agreeable to his own conscience, nor be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tithes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to do. No one religious society shall ever be established in this State, in preference to another; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles.

between the state and religion that this actually happened as a matter of practice.

Consider, first, Connecticut. Colonial Connecticut established Congregationalism as the state religion.¹⁴⁷ In 1776, the Connecticut Constitution stated an unequivocal preference for Christianity.¹⁴⁸ This was a reaffirmation of the Connecticut Charter of 1662, which had phrased the mission of Connecticut as "[w]in[ning] and invit[ing] the Natives of the Country to the Knowledge and Obedience of the only true GOD, and the Saviour of Mankind, and the Christian Faith, which in Our Royal Intentions, and the adventurers free Possession, is the only and principal End of this Plantation."¹⁴⁹ In 1818, Connecticut officially disestablished Congregationalism and repealed its religious preferences by way of a new constitution that ensured religious freedom to all¹⁵⁰ and forbade the establishment of a Christian religion.¹⁵¹ Nevertheless, the new Connecticut Constitution imposed a "duty" on all residents "to worship the Supreme Being."¹⁵²

147. Levy, *supra* note 6, at 41.

148. CONN. CONST. of 1776, pmbl.:

The People of this State, being by the Providence of God, free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign, and independent State; and having from their Ancestors derived a free and excellent Constitution of Government whereby the Legislature depends on the free and annual Election of the People, they have the best Security for the Preservation of their civil and religious Rights and liberties. And forasmuch as the free Fruition of such Liberties and Privileges as Humanity, Civility and Christianity call for, as is due to every Man in his Place and Proportion, without Impeachment or Infringement, hath ever been, and will be the Tranquility and Stability of Churches and Commonwealths; and the Denial thereof, the Disturbance, if not the Ruin of both.

149. CHARTER OF CONNECTICUT (1662).

150. CONN. CONST. of 1818, art. I, § 3 ("The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this State, provided that the right hereby declared and established shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State.").

151. *Id.* art. I, § 4 ("No preference shall be given by law to any christian sect or mode of worship.").

152. *Id.* art. VII, § 1:

It being the duty of all men to worship the Supreme Being, the great Creator and Preserver of the Universe, and their right to render that worship in the mode most consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church, or religious association; but every person now belonging to such congregation, church, or religious association, shall remain a member thereof until he shall have separated himself therefrom, in the manner

In colonial New Hampshire, Congregationalism was established by law.¹⁵³ New Hampshire's Constitution of 1784 preserved the freedom of religion and conscience to its citizens, yet, nevertheless, retained an explicit preference for Protestantism.¹⁵⁴ Not much had changed by 1792, when New Hampshire adopted an altered and amended constitution, which

hereinafter provided. And each and every society or denomination of Christians in this State shall have and enjoy the same and equal powers, rights, and privileges; and shall have power and authority to support and maintain the ministers or teachers of their respective denominations, and to build and repair houses for public worship by a tax on the members of any such society only, to be laid by a major vote of the legal voters assembled at any society meeting, warned and held according to law, or in any other manner.

153. See Ariens & Destro, *supra* note 110, at 53.

154. N.H. CONST. of 1784, art. I, §§ V–VI:

Every individual has a nature and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others, in their religious worship.

As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection; and as the knowledge of these, is most likely to be propagated through a society by the institution of the public worship of the DEITY, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this state have a right to empower, and do hereby fully empower the legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this state, to make adequate provision at their own expense, for the support and maintenance of public protestant teachers of piety, religion and morality:

Provided notwithstanding, That the several towns, parishes, bodies-corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance. And no person of any one particular religious sect or denomination, shall ever be compelled to pay toward the support of the teacher or teachers of another persuasion, sect or denomination.

And every denomination of Christians demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another, shall ever be established by law.

And nothing herein shall be understood to affect any former contracts made for the support of the ministry; but all such contracts shall remain, and be in the same state as if this constitution had not been made.

included a bill of rights that remained substantively unaltered.¹⁵⁵ Not until the early nineteenth century did New Hampshire's official support of religion come to an end at the hands of the state's new Toleration Act of 1819.¹⁵⁶

The story of Massachusetts is similarly inconsistent. Authorized under the 1620 Charter of New England, Massachusetts was settled by dissenters of the Church of England.¹⁵⁷ The Massachusetts Constitution of 1780 enshrined religious freedom,¹⁵⁸ but, nevertheless, retained a preference for Protestants.¹⁵⁹ Massachusetts was the last state, in 1833, to fully

155. N.H. CONST. of 1792, art. I, §§ V-VI.

156. Levy, *supra* note 6, at 45.

157. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1896 (1983).

158. MASS. CONST. of 1780, art. II:

It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.

159. *Id.* art. III:

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 preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, 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 in all cases where such provision shall not be made voluntarily.

And the people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided, notwithstanding, That the several towns, parishes, precincts, and other bodies-politic, or religious societies, shall at all times have the exclusive right of electing their public teachers and of contracting with them for their support and maintenance.

And all moneys paid by the subject to the support of public worship and of the public teachers aforesaid shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own

terminate its official state sanction of religion.¹⁶⁰ In that year, the state amended its constitution to repeal its requirement for taxpayer support of religion.¹⁶¹ As evidence of the mixed message on the role of religion in public life in Massachusetts, the state high court sustained a blasphemy conviction only five years after the state had ostensibly disestablished the Church.¹⁶² Blasphemy statutes were a reflection of the extent to which Christianity had infused the common law.¹⁶³

Of the two remaining original colonies—Pennsylvania and Rhode Island—neither has had an established church. Rhode Island neither established a denominational church, nor required

religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid toward the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

And every denomination of Christians, demeaning themselves peaceably and as good subjects of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.

160. Derek H. Davis, *Kansas Versus Darwin: Examining the History and Future of the Creationism-Evolution Controversy in American Public Schools*, 9 KAN. J.L. & PUB. POL'Y 205, 208 (1999).

161. MASS. CONST. of 1780, art. III (amended 1833):

As the public worship of God, and the instructions in piety, religion, and morality, promote the happiness and prosperity of a people, and the security of a republican government; therefore, the several religious societies of this commonwealth, whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses; and all persons belonging to any religious society shall be taken and held to be members, until they shall file with the clerk of such society a written notice declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract which may be thereafter made or entered into by such society; and all religious sects and denominations, demeaning themselves peaceably and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.

162. *Commonwealth v. Kneeland*, 37 Mass. 206 (1838); Sarah Barringer Gordon, "Our National Hearthstone": *Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America*, 8 YALE J.L. & HUMAN. 295, 337 (1996).

163. G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 88 (1989) ("State courts continued to recognize Christianity as part of the common law and to sustain convictions for blasphemy when speakers disparaged Christian beliefs.").

compulsory church attendance.¹⁶⁴ Its founding Charter of 1663 is a model of religious freedom.¹⁶⁵ Rhode Island did not draft a new constitution until 1842.¹⁶⁶ The constitution drew its guiding

164. Isaac A. Cornelison, *THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA* 64 (2d prtg. 1970).

165. *CHARTER OF RHODE ISLAND AND PROVINCE PLANTATIONS* (1663):

[A]nd whereas, in their humble addresse, they have ffreely declared, that it is much on their hearts (if they may be permitted), to hold forth a livelie experiment, that a most flourishing civill state may stand and best bee maintained, and that among our English subjects, with a full libertie in religious concernments; and that true pietye rightly grounded upon gospell principles, will give the best and greatest security to soveraignetye, and will lay in the hearts of men the strongest obligations to true loyaltye: Now know yee, that wee beinge willinge to encourage the hopefull understakeinge of oure sayd loyall and loveinge subjects, and to secure them in the free exercise and enjoyment of all their civill and religious rights, appertaining to them, as our loveinge subjects; and to preseve unto them that libertye, in the true Christian ffaith and worship of God, which they have sought with soe much travail, and with peaceable myndes, and loyall subjectione to our royall progenitors and ourselves, to enjoye; and because some of the people and inhabitants of the same colonie cannot, in their private opinions, conforme to the publike exercise of religion, according to the liturgy, formes and ceremonies of the Church of England, or take or subscribe the oaths and articles made and established in this nation: Have therefore thought ffit, and doe hereby publish, graunt, ordeyne and declare, That our royall will and pleasure is, that noe person within the sayd colonie, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freely and fullye have and enjoye his and their owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned; they behaving themselves peaceable and quietlie, and not using this libertie to lycentiousnesse and profanenesse, nor to the civill injurie or outward disturbance of others; any lawe, statute, or clause, therein contained, or to bee contained, usage or custome of this realme, to the contrary hereof, in any wise, notwithstanding. And that they may bee in the better capacity to defend themselves, in their just rights and libertyes against all the enemies of the Christian ffaith, and others, in all respects, wee have further thought fit, and at the humble petition of the persons afosesayd are gratusly pleased to declare, That they shall have and enjoye the benefitt of our late act of indemnity and ffree pardon, as the rest of our subjects in other our dominions and territoryes have; and to create and make them a bodye politique or corporate, with the powers and priviledges hereinafter mentioned. And accordingly our will and pleasure is, and of our especiall grace, certaine knowledge, and mere motion, wee have ordeyned, constituted and declared, and by these presents, for us, our heires and successors, doe ordeyne, constitute and declare . . .

166. R.I. CONST. of 1842.

principles from the original Charter.¹⁶⁷ There is no mixed message in Rhode Island.

Although Pennsylvania did not have an established church, it, nonetheless, exhibited some establishmentarian features. In its early days, the colony had a long history of religious freedom and denied "the propriety of any religious establishment."¹⁶⁸ Its Charter of 1681 guaranteed freedom of religion and conscience,¹⁶⁹ as did its Frame of Government of 1682¹⁷⁰ and its Charter of Privileges of 1701.¹⁷¹ The Constitution of 1776 also safeguarded freedom of religion and conscience, but, importantly, only to those "who acknowledge[d] the being of a God."¹⁷² The Constitution of

167. Ariens & Destro, *supra* note 110, at 55.

168. Cobb, *supra* note 111, at 422.

169. CHARTER FOR THE PROVINCE OF PENNSYLVANIA (1681):

AND Our further pleasure is, and wee doe hereby, for us, our heires and Successors, charge and require, that if any of the inhabitants of the said Province, to the number of Twenty, shall at any time hereafter be desirous, and shall by any writeing, or by any person deputed for them, signify such their desire to the Bishop of *London* for the time being that any preacher or preachers, to be approved of by the said Bishop, may be sent unto them for their instruction, that then such preacher or preachers shall and may be and reside within the said Province, without any denial or molestation whatsoever.

170. FRAME OF GOVERNMENT OF PENNSYLVANIA of 1682, art. XXXV:

That all persons living in this province, who confess and acknowledge the one Almighty and eternal God, to be the Creator, Upholder and Ruler of the world; and that hold themselves obliged in conscience to live peaceably and justly in civil society, shall, in no ways, be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship, nor shall they be compelled, at any time, to frequent or maintain any religious worship, place or ministry whatever.

171. CHARTER OF PRIVILEGES FOR PENNSYLVANIA (1701). First:

BECAUSE no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship: And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare, That no Person or Persons, inhabiting in this Province or Territories, who shall confess and acknowledge *One* almighty God, the Creator, Upholder and Ruler of the World; and profess him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their religious Persuasion.

172. PA. CONST. of 1776, art. II:

1790 changed very little with regard to religious liberty,¹⁷³ but it did continue the religious requirement for holding public office.¹⁷⁴

As demonstrated above, disestablishment in the original American colonies-turned-states did not effect a real and complete separation of religious and public authorities. Quite the contrary, for states did indeed reveal some measure of solicitude and partiality for religion, in general, or a given denomination, in particular—even those states whose constitutional instruments purported to prohibit designating an official religion or extending preferences to a religion or denomination. This is significant because it underscores the degree to which early Americans struggled to remove religion from the public square. This debate was not confined to the American masses. Indeed, it reached well into the highest levels of government. Even the Supreme Court of the United States found it difficult to reconcile liberal democratic principles of secularism with the centrality of religion to the lives of Americans.

B. Early Establishment Doctrine

Early religion jurisprudence makes plain the Court's valiant effort to interpret and apply the Establishment Clause. In the early

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.

173. PA. CONST. of 1790, art. IX, § 3:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship.

174. *Id.* art. IX, § 4 ("That no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.").

days of the republic, the Court found itself pulled in opposite directions by two incompatible, though equally plausible, visions of the Establishment Clause. The choice facing the Court was whether to read the Establishment Clause as a necessary protection against a force—religion—that threatened to exacerbate the vulnerabilities of the emergent nation, or as an indispensable instrument to cultivate tolerance and equality among the newly-partnered peoples of the several states.¹⁷⁵

In its first declaration on the intersection of matters of faith and the state, the Supreme Court addressed whether a statute disestablishing the Episcopal Church in Virginia had the contemporaneous effect of appropriating church properties into the possession of the state.¹⁷⁶ This was a free exercise case that turned on statutory construction and principles of property law. Though the Court did not detail precisely what constituted an impermissible establishment of religion, its reflection on the permissible scope of interaction between religious and public institutions revealed the benevolence with which the Court regarded the role of religion in early post-colonial America.

In ruling that the state of Virginia could divest the formerly established Episcopal Church of its property, the Court articulated the earliest antecedent to the theory of non-preferentialism:

But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention to votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers, cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations. While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations.¹⁷⁷

Here, we read the Court's attempt to make a comfortable place for religion in American public life, one where government may freely aid religious institutions, just as it may do so in respect of other organizations that serve the public interest, including

175. See *infra* this Part.

176. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815).

177. *Id.* at 49.

charities. To do so, the Court unveils the theory of non-preferentialism. This theory—also known as benevolent neutrality—holds that the state may favor religion with public funds while remaining squarely within the bounds of the Establishment Clause, as long as the state favors all religions equally without betraying a preference for any particular religion or religions to the detriment of others.¹⁷⁸ Several modern scholars have encouraged the Court to adopt non-preferentialism as a policy more closely in keeping with the original conception of the Establishment Clause.¹⁷⁹ This stands in contrast to what the Court today advances as a policy of strict neutrality toward religion and religious institutions.¹⁸⁰

In another early property case, the Court distinguished an established church from a corporation, noting that an established church enjoys “peculiar rights and privileges” dispensed “under the patronage of the state.”¹⁸¹ There was no mention in the case of what makes an establishment of religion unlawful, but the Court’s choice of words in this early establishment dispute was significant because they would go on to inform the development of the Establishment Clause into a sentinel keeping vigil over the affairs of the state, ensuring that no church or religion enjoyed special rights or privileges, or the patronage of the state in either form or substance.

Sixty years later, the Court ruled on one of several polygamy cases.¹⁸² Again, this was not an establishment case. It was instead a free exercise case in which the Court authorized Congress to enact certain rules of action and conscience that forbade the practice of polygamy. To permit polygamy, writes the Court, would be “to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”¹⁸³ Under such circumstances,

178. See Derek Davis, ORIGINAL INTENT 48–49 (1991).

179. See generally, e.g., Robert L. Cord, SEPARATION OF CHURCH AND STATE (1982); Michael J. Malbin, RELIGION AND POLITICS (1978).

180. Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 2–3 (2005).

181. *Pawlet v. Clark*, 13 U.S. (9 Cranch) 292, 325 (1815) (“The phrase, ‘the church of England,’ so familiar in our laws and judicial treatises, is nothing more than a compendious expression for the religious establishment of the realm, considered in the aggregate under the superintendence of its spiritual head. In this sense the church of England is said to have peculiar rights and privileges, not as a corporation, but as an ecclesiastical institution under the patronage of the state.”).

182. *Reynolds v. United States*, 98 U.S. 145 (1878).

183. *Id.* at 167.

"government could exist only in name"¹⁸⁴ and no further.¹⁸⁵ Writing in dicta and commenting on religious establishments before the American Revolution, the Court offered its first applicable insight into what constituted an impermissible establishment of religion:

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions.¹⁸⁶

This passage traces at least three formative principles that underpin the early American understanding of a prohibited establishment of religion: (1) state mandated financial support for religion; (2) state dispensed penalties for failure to support religion; and (3) state dispensed penalties for embracing beliefs contrary to particular religious teachings. Any of these three conditions were sufficient to invalidate a statute as violative of the Establishment Clause. And each of these three was, consequently, regarded as not only unconstitutional, but also damaging to the health of the burgeoning democracy. What is curious, though, is that the establishmentarian colonies had widely shared each of these three features in common prior to disestablishment not too long before the Court made this fateful declaration.¹⁸⁷ Thus, in taking its first steps to chart the meaning of the Establishment Clause, the Court defined an unlawful establishment of religion in terms of what had previously been lawful in establishmentarian colonies.

These early Supreme Court cases begin to hint at the coming inconsistency that the Court would face in the twentieth century:

184. *Id.*

185. *See Davis v. Beason*, 133 U.S. 333, 342–43 (1890) ("With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.").

186. *Reynolds*, 98 U.S. at 162–63.

187. *See supra* Part IV.A.

how to square one line of religion cases that adopted a positive posture toward religion, for instance, by recognizing the significance of religion to Americans, with another line of cases that guarded the state and its organs against the infusion of religion, whether through establishmentarian features or religious practices by public officials. The Court's view of religion and religious institutions, as powerfully constructive forces in America, is apparent in one noteworthy nineteenth century case that was decided after the ratification of the Bill of Rights and after disestablishment.

Church of the Holy Trinity v. United States is particularly illustrative of the deferential posture the Court typically adopted with respect to the role and function of religion in the American polity.¹⁸⁸ Here, a church had contracted with an English clergyman to lead its congregation as pastor.¹⁸⁹ The clergyman was subsequently charged with violating federal employment laws that prohibited an employer from contracting with foreign laborers for employment in the United States.¹⁹⁰ On appeal, the Court reversed the lower court's decision, relying largely upon principles of statutory interpretation to read the federal law as applying only to unskilled laborers and not to professionals, such as ministers or pastors.¹⁹¹

The Court permitted itself to ponder the larger question that lay behind the frontage: What does religion mean in America? It meant, according to the Court, that without religion America would not be, well, America:

[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.¹⁹²

The Court proceeded to review the religious content of the various charters authorizing the founding of the first American colonies, as well as the religious roots of the Declaration of Independence. The Court then paused to consider the constitutions of the several states and noted that each made reference to religion and religious obligations:

188. 143 U.S. 457 (1892).

189. *Id.* at 458.

190. *Id.*

191. *Id.* at 472.

192. *Id.* at 465.

If we examine the constitutions of the various states, we find them in a constant recognition of religious obligations. Every constitution of every one of the 44 states contains language, which either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the well-being of the community.¹⁹³

Far from recoiling from these obligations, wrote the Court, citizens passionately invite and embrace these references to religion and religious obligations.¹⁹⁴ Quite simply, America is a religious nation sustained by a religious people. Indeed, when one turns to the formative documents from the American founding, such as the Declaration of Independence or the U.S. Constitution or state constitutions, the reader cannot help but perceive from these texts a harmonious message trumpeting the nourishing quality of religion to America:

There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons. They are organic utterances. They speak the voice of the entire people.¹⁹⁵

Insisting that America is a religious nation that was founded and is preserved by a religious people, the Court then returned to the facts of the case—a church hiring an English pastor to come to the United States—and took measured care to stress the importance of religion to fortifying the metaphorical structure of American civil society.¹⁹⁶

Next, the Court proposed a thought experiment in which a congressional bill reached the floor of the Congress proposing to prohibit any Roman Catholic church from hiring a Cardinal, any Episcopal church a Canon, any Baptist church a Reverend, or any Jewish synagogue a Rabbi.¹⁹⁷ “[C]an it be believed,” questioned the Court in rhetorical fashion (framing the question such that the answer of course is no) “that [such a bill] would have received a minute of approving thought or a single vote?”¹⁹⁸ Never, according to the Court, would such a bill have received serious

193. *Id.* at 468.

194. *Id.* at 468–69.

195. *Id.* at 470.

196. *Id.* at 470–71.

197. *Id.* at 471–72.

198. *Id.* at 472.

thought because it aimed to do something "which the whole history and life of the country affirm could not have been intentionally legislated against."¹⁹⁹ Thus, as the Court made plain, religion occupied then, as now, a privileged place in the hearts of both the makers and interpreters of the law, and held an acknowledged status of ascendancy that was shared by no other institution.

Yet the Court also recognized the danger of blending religion with government. Despite accepting that Americans were a deeply religious people, the Court was reluctant to give free rein to religion. Perhaps nowhere was this reticence more apparent than in one of the first charitable bequest cases to reach the Supreme Court docket.²⁰⁰ In *Vidal v. Girard's Executors*,²⁰¹ the Court betrayed in plain view the unsettled tension that lay at the source of the developing incoherence of establishment jurisprudence. Consider first the facts of the case. Upon the death of Girard—a Frenchman who had emigrated from his home to the United States—his heirs and others challenged the validity of his last will and testament.²⁰² Among his several directives, Girard had set aside part of his fortune to build and sustain a residential college in the state of Pennsylvania in order to educate poor, white, orphaned children between the ages of six and ten.²⁰³ In addition to specifying such details as the location of the school, admission requirements, and curriculum, Girard insisted *against* religion in all its manifestations, forbidding the college from employing anyone to discharge any station related to religion, prohibiting instructors from teaching religious subjects, and even barring missionaries and ministers from visiting the college.²⁰⁴ Girard's stated objective in establishing these proscriptions was "that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality."²⁰⁵

Though his will had made no such express mention, Girard's reasoning was surely inspired by the governing philosophy of his native France, where secularism has long been a flagstaff.²⁰⁶

199. *Id.*

200. The first charitable bequest case involving the subject of religion appears to have been *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 17 U.S. (4 Wheat) 1 (1819). But neither principles of religious freedom nor those of religious establishment informed the Court's resolution of *Hart's Executors*. See *id.*

201. 43 U.S. (2 How.) 127 (1844).

202. *Id.* at 186.

203. *Id.* at 184.

204. *Id.* at 197.

205. *Id.* at 200.

206. *Id.* at 127–28.

Indeed, secularism is but one of the formative values pressed upon the French citizenry toward the larger purpose of cultivating a willing subordination of the self in favor of the superior whole, and shedding all distinguishing ties or affiliations or involvements that threaten nationhood, loyalty to the republic, and the integrity of the bond marrying citizen to state.²⁰⁷

Girard's requirement of a similar secularism as the foundation of his college was condemned by the plaintiffs in *Vidal* as derogatory and hostile to Christianity.²⁰⁸ The Court ultimately rejected this challenge and authorized the construction of the college according to Girard's specifications, concluding that Girard's secular conditions precedent to the establishment of the college were not in fact contrary to Pennsylvania's Constitution.²⁰⁹ Recognizing that the "country [is] composed of such a variety of religious sects,"²¹⁰ the Court observed of the Pennsylvania Bill of Rights²¹¹ that "language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels."²¹² This case was a victory for those who understood religious freedom as including both freedom *of* religion (the right to practice and observe any religion) and freedom *from* religion (the right *not* to practice and observe *any* religion at all).

The Court's result in *Girard's Executors* is not as noteworthy as its animated reasoning. It is clear that the Court was compelled to reach this result in order to comport with the command of

207. This French theory of secularism is called *laïcité*. It is a difficult term to define but it is central to the French philosophy of the secular state. See T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420–21, 428–30 (2004). See also Rik Torfs, *Church and State in France, Belgium, and the Netherlands: Unexpected Similarities and Hidden Differences*, 1996 BYU L. REV. 945, 950–55 (1996) (discussing theory of *laïcité*); Jessica Fourmeret, Note, *France: Banning Legal Pluralism by Passing a Law*, 29 HASTINGS INT'L & COMP. L. REV. 233, 235–37 (2006) (tracing history of *laïcité*).

208. *Vidal*, 43 U.S. (2 How.) at 197.

209. *Id.* at 200–01.

210. *Id.* at 198.

211. PA. CONST. of 1790, art. IX, § 3 ("That all men have a natural and infeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship.").

212. *Vidal*, 43 U.S. (2 How.) at 198.

religious freedom under the Pennsylvania Bill of Rights.²¹³ What is less clear, however, is why the Court effectively undermined the force of its result by construing Girard's will as permitting individual instructors to share with pupils their own religious opinions in the context of instilling into their minds "the purest principles of morality."²¹⁴

Nowhere, the Court observed, does Girard's will "say that Christianity shall not be taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college."²¹⁵ Pursuing its exercise in revisionist textualism, the Court zeroed in on Girard's requirement "that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality,"²¹⁶ only to ask rhetorically "where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?"²¹⁷ According to the Court, the only point that could be reliably discerned from the will was that "he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and of course, including the best, the surest, and the most impressive."²¹⁸ This latter reference was to the Bible. This case ended the Court's excruciating effort to reconcile Girard's unambiguous prohibition from his college of all things and persons religious in nature with the Court's own reverence for religion and its appreciation of the focal function of religion in American life.

Vidal transparently demonstrates the Court's early reluctance to negotiate its obeisance to two masters: constitutional law and religion. Both federal and state constitutions at the time had prohibited established religion and promised religious freedom. However, applying these two principles of constitutional law with vigor required the Court to close its eyes to the reality that America was a religious nation, specifically, a Christian nation. It was thus unthinkable for the Court to give breadth to the guarantee of religious freedom in such a way as to displace the primacy of

213. As of the date of decision in *Vidal*, the several states were not yet subject to the U.S. Bill of Rights. Indeed, it was not until 1940 that the federal analogue to the Pennsylvanian religious freedom clause was applied to constrain the actions of the several states. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause).

214. *Vidal*, 43 U.S. (2 How.) at 200.

215. *Id.* at 199.

216. *Id.* at 200.

217. *Id.*

218. *Id.*

Christianity, just as it was equally implausible that the Court would render a decision that undermined in any substantive fashion the role of religion in America.

Other Supreme Court cases during the first American century reveal a now familiar effort both to defend the people from the perceived dangers of religion and to leave room for them to recognize the good that can come only from religion. For instance, only a few years after the last of the American states officially disestablished, the Supreme Court ruled that the Bill of Rights was not effective as against an action by a state to impair religious liberty: "The Constitution [of the United States] makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."²¹⁹ The effect of this decision was, therefore, to re-establish official religion in the disestablished states. Consider that if a state purports to disestablish its church, yet is subject to no sanction for violating the religious freedom safeguards in the Bill of Rights, that state may actually, though not officially, stealthily reinstate its preferences for the formerly established church.

This very issue came before the Supreme Court in the form of a dispute over liability for cargo that had been lost because it had been left unattended during an official day of fasting and prayer proclaimed by the Governor of a state.²²⁰ The Court imposed liability not on the carrier who had delivered the goods, but rather on the offloaders who should have discharged the goods from the vessel and not shirked their job duties in order to observe a voluntary holiday: "The proclamation of the Governor is but a recommendation. It has not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary, and not of compulsion, and holiday is a privilege, not a duty."²²¹ The Court also added that the proclamation was not intended to weigh heavily on "man's conscience to abstain from his worldly occupations on [that] day."²²² The Court, likewise, made certain to recognize the broad significance of this day of prayer to the lives of those who observe it, highlighting that the day was "an excellent custom"²²³ that had been "piously named."²²⁴ This was one of two cases decided by the Court on the subject that year.²²⁵

219. *Permoli v. New Orleans*, 44 U.S. (3 How.) 589, 609 (1845).

220. *Richardson v. Goddard*, 64 U.S. (23 How.) 28 (1859).

221. *Id.* at 43.

222. *Id.*

223. *Id.*

A few years later, the Court again addressed the issue of the day of rest. This time, the Court upheld a prohibition against labor on Sunday.²²⁶ Concluding that the Sunday law was intended to "protect all persons from the physical and moral debasement which comes from uninterrupted labor,"²²⁷ the Court cast aside the claim that the Sunday law was an effort "to legislate for the promotion of religious observances."²²⁸ Those laws "have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."²²⁹ Therefore, the justification for Sunday laws was framed in terms of state police powers. This approach, however, was perhaps part of a larger effort—as replicated in some states²³⁰—to fashion a secular justification for a religious practice.²³¹

Another area of early religion jurisprudence demonstrates a similar reluctance of the judiciary to undermine the sanctity and sovereign independence of religious institutions. For instance, courts typically steer clear of intrachurch disputes, preferring

224. *Id.*

225. In the other case, the Supreme Court held that a steamboat company—despite sailing on a Sunday in violation of a state law—was entitled to damages against a railroad company that had left debris in the river. *Philadelphia, Wilmington & Baltimore R.R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209 (1859).

226. *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

227. *Id.* at 710.

228. *Id.*

229. *Id.*

230. See, e.g., *Ex parte Andrews*, 18 Cal. 678, 684 (1861) ("At least, the mere fact, as we have intimated, that the closing of shops on that day might be more convenient to Christians, or might advance their religious aims or views, is no reason for holding the law unconstitutional."); *State v. Petit*, 77 N.W. 225, 226 (Minn. 1898) ("In some states it has been held that Christianity is part of the common law of this country, and Sunday legislation is upheld, in whole or in part, upon that ground. Even if permissible, it is not necessary to resort to any such reason to sustain such legislation. The ground upon which such legislation is generally upheld is that it is a sanitary measure, and as such a legitimate exercise of the police power."); *Specht v. Commonwealth*, 8 Pa. 312, 323 (1848) ("Though it may have been a motive with the law-makers to prohibit the profanation of a day regarded by them as sacred—and certainly there are expressions used in the statute that justify this conclusion—it is not perceived how this fact can vitally affect the question at issue. All agree that to the well-being of society, periods of rest are absolutely necessary.").

231. See Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 685–88 (2000).

instead to let religious institutions govern themselves.²³² In one of the leading intrachurch dispute cases, the Supreme Court cautioned judges not to “impermissibly substitute[] [their] own inquiry into church polity and resolutions” for those of the ecclesiastical tribunals of a church.²³³ The petitioners sought—and earned—a reversal of the Illinois Supreme Court’s invalidation on grounds of arbitrariness of the decision of church authorities to remove and defrock a bishop. The Court held that “the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical policy, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or policy before them.”²³⁴

The Court ruled that assessing the petitioner’s claim—that an employment decision by the Serbian Eastern Orthodox Diocese was arbitrary—would necessarily entail an impermissible inquiry “into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question.”²³⁵ Were the Court to engage in this judicial analysis, it would be “exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.”²³⁶

In reaching its conclusion, the Court relied on the rule in *Watson v. Jones*,²³⁷ a nineteenth century case holding that “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these

232. See, e.g., *Dobrota v. Free Serbian Orthodox Church* “St. Nicholas,” 952 P.2d 1190 (Ariz. Ct. App. 1998) (holding that the court may not decide dispute between church and priest concerning termination of employment); *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923 (Mass. 1997) (holding that the court does not have jurisdiction to resolve dispute on the validity of an election of a new vestry and on the disqualification of certain individuals from serving as members of the parish corporation); *Sacrificial Missionary Baptist Church v. Parks*, No. 71608, 1997 WL 812168 (Ohio App. 8th Dec. 30, 1997) (holding that the court does not have jurisdiction to intervene in dispute concerning termination of pastor).

233. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708 (1976).

234. *Id.* at 709.

235. *Id.* at 713.

236. *Id.*

237. 80 U.S. (13 Wall.) 679 (1872).

church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."²³⁸ The dispute involved a disagreement over church property between two groups of disagreeing church trustees, one of which ultimately defected.²³⁹ The defecting trustees later denied the action and authority of the church whose property they were then claiming.²⁴⁰ The Court refused to intervene in the intrachurch dispute, opting instead to abide by the judgment of the church.²⁴¹

The reasoning in *Watson* was underpinned by the rule of sovereign independence of religious institutions, which regards a church as a self-governing community in which those who join the group do so with an implied consent to bind themselves to its practices and conventions. The corollary of this proposition is that if a group member is aggrieved by a decision of the church, then that member cannot appeal to a secular court to reverse the determination of the sovereign church. According to this theory, the mechanisms of the church and state are wholly separate, autonomous, and—in their own respective spheres—authoritative as to their membership rules.

The Court's respect for the inner workings of religious institutions was also evident in another case decided in the same year as *Watson*. But the Court's deference was tempered by the interest of advancing the broader principle of majoritarian democracy, which, in *Bouldin v. Alexander*, the Court determined had to trump the competing interest of allowing a church congregation to govern itself.²⁴² Here, the Court was called to settle a dispute between two church factions, each believing itself—and not the other—to constitute the same church congregation. The minority faction held a meeting to oust trustees and members of the majority faction from the congregation, to which the removed members responded by filing suit to be restored to their positions.²⁴³

In announcing its decision—that the removal was null and void—the Court took great care to stress that it has "no power to

238. *Id.* at 727.

239. *Id.* at 681.

240. Although the Court did not rely on it, *Baker v. Nachtrieb*, 60 U.S. (19 How.) 126 (1856), may have informed its judgment. In *Baker*, the Court ruled that defecting members of a church could not repossess a corresponding share of the church property. *Id.* at 130.

241. *Watson*, 80 U.S. (13 Wall.) at 729.

242. 82 U.S. (15 Wall.) 131, 139–40 (1872).

243. *Id.* at 137.

revise or question ordinary acts of church discipline, or of excision from membership.”²⁴⁴ The Court added that it:

[C]annot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others.²⁴⁵

Since the minority faction had improperly sought to remove a majority of the congregation, the Court invalidated the actions of the minority. “In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church,” and “an expulsion of the majority by a minority is a void act.”²⁴⁶

As demonstrated above, several states may have duly ratified a constitutional provision disclaiming the union of religion and the public sphere. Nonetheless, alongside these constitutional protections against establishment, some states preserved a special status for religious institutions. This effort to make a special place for religion in America reflected the uneasy debate among Americans about how to mediate the tension between ensuring religious freedom for religious minorities and adhering to one’s own majority religious faith. Instead of being settled when it reached the Supreme Court, this debate continued. As it decided religious disputes on its docket, the Court sought at once to protect public offices and institutions from the divisive forces of steadfast religious conviction and to ensure the American people that they could freely practice their respective religions without shedding or suppressing their religious beliefs as they entered public life. Thus, the Court was thrust into the role of conciliator between those who would remove religion from the public square and those who could not conceive of the United States without religion, which, to them, was the cornerstone around which the nation was founded and its civil and political structures erected.

V. CONCLUSION

Principled nuance is a virtue when there are elemental questions of democratic theory standing in the balance that will align the nation on its constitutional trajectory. This is precisely

244. *Id.* at 139.

245. *Id.* at 139–40.

246. *Id.* at 140.

what characterized the work of the Supreme Court in the early elaboration of American religion jurisprudence. Though modern establishment doctrine may be incoherent in some consequential ways, it is inaccurate to trace the origins of this incoherence to the Supreme Court. Granted, the Court vacillated during the first American century between which of two dueling models—protective or aspirational—should govern the interpretation of the Establishment Clause. But the Court did so only because such was the state of public feeling and discourse at the time in the American union. Early establishment doctrine reflected the changing contours of the public debate about the proper role of religion in the public square and the relationship between religious and civil institutions. Both of these institutions discharged a critical function in the creation of the American republic.

Going forward, the Supreme Court will continue to struggle with how best to umpire the debate between those who fear religious division in multicultural America and those who believe abidingly that religious virtue must illuminate the machinery of government and pilot its human operators. The Court should welcome this debate. It will be a teaching moment for the American people about themselves and the path they wish to chart together in the coming years. The Court should not impose its preferred conception of the balance between religion and government, neither preempting nor short-circuiting the continuing constitutional conversation among Americans on this fateful issue of nationhood. The founding promise of participatory democracy is furthered, and indeed very well served, when citizens engage each other on the shape and content of their public institutions.

As a matter of normative theory, the conventional wisdom may perhaps demand that the United States adopt one of the two competing views on the role of religion in a liberal democracy. But, as a matter of practice, disconnected theory must not be permitted to trump the freely expressed convictions of Americans about how they wish to govern themselves. This is a pillar of self-determination and popular sovereignty. The Court—which draws its legitimacy from the people themselves—must not merely tolerate these public discussions. The Court must do more. It must create constitutionally protected space for citizens to deliberate both privately and publicly—and to subsequently express themselves in the public square—about issues of faith and belief. These fundamental matters of statecraft may be resolved only when public institutions reflect the will of the people.