

Spring 1999

Roger Williams' Gift: Religious Freedom in America

Edward J. Eberle

Roger Williams University School of Law

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation

Eberle, Edward J. (1999) "Roger Williams' Gift: Religious Freedom in America," *Roger Williams University Law Review*: Vol. 4: Iss. 2, Article 3.

Available at: http://docs.rwu.edu/rwu_LR/vol4/iss2/3

This Article is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

Roger Williams' Gift: Religious Freedom in America

Edward J. Eberle*

TABLE OF CONTENTS

INTRODUCTION	427
I. THE LIFE OF ROGER WILLIAMS	429
II. THE RELIGIOUS THOUGHT OF ROGER WILLIAMS	438
A. <i>Individual Protections of Religious Freedom</i> ...	440
1. <i>Cause of Conscience</i>	440
2. <i>Summary on Conscience</i>	450
3. <i>Tolerance</i>	450
B. <i>Institutional Protection of Religion</i>	453
1. <i>Separation</i>	453
2. <i>The Different Jurisdictions of State and Religion</i>	456
3. <i>No National Church</i>	460
4. <i>Church as Association in Society</i>	463
C. <i>Summary</i>	463
III. ROGER WILLIAMS' FORGOTTEN INFLUENCE ON THE FIRST AMENDMENT	464
IV. ROGER WILLIAMS IN MODERN SUPREME COURT JURISPRUDENCE	471
A. <i>Individual Protections</i>	472
1. <i>Conscience</i>	472
2. <i>Coercion</i>	474

* Professor of Law, Roger Williams University School of Law (B.A. Columbia 1978; J.D. Northwestern 1982). Copyright 1998, by Edward J. Eberle. All rights reserved. I would like to thank Professor Tim Hall of the University of Mississippi Law School for his comments on earlier drafts of this Article, and Professor J. Stanley Lemons of Rhode Island College for his useful insights concerning the early history of Rhode Island. I would also like to thank my colleague Professor Carl Bogus for suggesting the title of this Article.

3.	<i>Governmental Neutrality: All Faiths Tolerated, None Persecuted</i>	476
B.	<i>Institutional Protections</i>	478
1.	<i>Separation</i>	478
2.	<i>The Different Jurisdictions of Church and State</i>	479
3.	<i>Social Peace</i>	482
4.	<i>Nonestablishment</i>	483
V.	THE SIGNIFICANCE OF ROGER WILLIAMS	485

[W]hen they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wilderness of the world, God hath ever broke down the wall itself, removed the Candlestick, and made his Garden a Wilderness, as at this day.¹

INTRODUCTION

The Supreme Court founded a jurisprudence of separatism on this metaphor.² Yet, the origin of the metaphor is Roger Williams, not Thomas Jefferson. Roger Williams wrote these words some 150 years before Jefferson used the phrase.³ The history of the metaphor symbolizes our regard of Roger Williams. Most of us have heard of Roger Williams; many of us recognize him as a religious prophet; but few know of his contributions to religious freedom and the American heritage. We know him more as a symbol of religious freedom than for his actual thoughts on the topic. This Article examines Williams' religious thought in order to illuminate his influence on religious freedom in America.

Roger Williams was an original thinker on issues of church and state. His central thesis was the inviolability of conscience in matters of faith. This thought constitutes a core of religious freedom, a bridge in American thought from Roger Williams, to the framing of the First Amendment religious protections, to Supreme Court jurisprudence today. Conscience was the medium by which man communicated with God. No authority, therefore, was justified in entering this sacred haven. Each man, moreover, was as worthy as another; all stood equal before God in their assertion of conscience. From these premises, Roger Williams advocated tolerance for all believers in society, even if he felt particular persons to be gravely mistaken in their beliefs. These thoughts helped lay the

1. Roger Williams, *Mr. Cotton's Letter Examined and Answered* (1644) [hereinafter *Cotton's Letter Examined*] (emphasis added), reprinted in 1 *The Complete Writings of Roger Williams* 313, 392 (Russel & Russel, Inc. 1963) [hereinafter *Complete Writings*].

2. See *Everson v. Board of Educ.*, 330 U.S. 1, 16, 18 (1947) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Thomas Jefferson)).

3. Compare *Cotton's Letter Examined*, *supra* note 1, at 392 (advocating the separation of church and state), with *Letter from Thomas Jefferson to Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in Connecticut* (Jan. 1, 1802) [hereinafter *Danbury Church Letter*], reprinted in *Thomas Jefferson: Writings* 510 (1984) (same).

foundation for the peaceful coexistence of religion and society, and also, for the pluralistic democracy we inhabit today.

The purposes of this Article are, first, to assess Roger Williams' contribution to the building of religious freedom in America and, second, assess how his thinking stands up today, as compared against the jurisprudence of the Supreme Court. To acquire some understanding of Roger Williams, the man and his times, Part I examines briefly his life. Roger Williams was an interesting figure in American history. He was our first rebel and our first anthropologist, studying and writing about the ways and languages of Native Americans, translating the culture of the New World for the Old World. He founded the Baptist Church in America. He was also a talented statesmen, twice securing an English charter for the new colony of Providence, later to become Rhode Island, which he organized, administered, and served as president.

Part II turns to an evaluation of Williams' work on religious freedom. Inspired by faith, Williams was a very original thinker on matters of church and state. To defend conscience, he reconceived the relationship of church to state, desiring to separate church from state and attempting to define the boundaries of each. He argued against establishment of national churches, reasoning from his experiences with orthodoxy in England and New England. Out of respect for conscience, he extended respect and protection on equal terms to all faiths, developing ideals of tolerance, which helped meet the needs of a growing, and increasingly diverse, society. These ideas formed a significant strand of thought that led to influence in the framing of the First Amendment, which Part III examines.

Part IV evaluates Roger Williams' thought in light of Supreme Court jurisprudence in order to assess how his philosophy resonates today. Assessing modern law against original thinking, from time to time, is useful because it allows us to see who we once were so that we might better understand who we have become. This is particularly the case with modern Free Exercise and Establishment Clause law, which seems as perplexing today as when the Court first entered the area.⁴

4. In the modern era, the Supreme Court began interpretation of the Free Exercise Clause in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and the Establishment Clause in *Everson*, 330 U.S. 1.

I. THE LIFE OF ROGER WILLIAMS

Roger Williams was a controversial figure in early American society. His cry for conscience was forged on the anvils of his own experiences, which were often bitter and difficult ones. For cause of conscience, in 1635, Williams was formally banished from the Massachusetts Bay Colony and left to exile, in the dead of winter, in Providence, which he founded on democratic principles and religious freedom. To understand Williams' thinking, some insight into the man and his time is necessary. We know him mainly today as a religious prophet. In his day, however, he was also known as an anthropologist, rebel, and statesman.

Roger Williams was born in 1603, in all probability, in London. He was learned in theology and law. While in London, he attracted the attention of Lord Coke, as a reporter of speeches and sermons in the Star Chamber.⁵ Impressed with the young Williams, Coke became his benefactor, sending him to preparatory school and then to Cambridge.⁶ Cambridge was a center of Puritan thought,⁷ attracting the likes of John Milton. While at Cambridge, he aligned himself against the established Church of

5. See Reuben Aldridge Guild, *Introduction* to The Writings of Roger Williams, in 1 Complete Writings, *supra* note 1, at 3. 6. Sir Edward Coke's daughter observed: "This Roger Williams, when he was a youth, would, in a short-hand, take sermons and speeches in the Star Chamber, and present them to my dear father. He, seeing so hopeful a youth, took such liking to him that he sent him to Sutton's Hospital." *Id.*

Professor Guild notes that Williams was born in Wales, but then went to London. See *id.* The later historical work of Professor Gaustad places Williams' birth in London. Of course, as Professor Gaustad notes, "filling in that bare outline [of Williams' history] is more a matter of conjecture than of historical record. Williams himself left behind no detailed account of his youthful days, and his boyhood contemporaries did little to shore up the many gaps." Edwin S. Gaustad, *Liberty of Conscience: Roger Williams in America* 5 (1991).

6. See Guild, *supra* note 5, at 7. Roger Williams went to Sutton's Hospital (later called Charter House) for preparatory school. See *id.* at 6. At Charter House, Williams learned Greek and Latin, which he became proficient in. While there is some dispute over the evidence, it seems Williams went to Cambridge, and not Oxford. See *id.* at 7. Professor Gaustad notes, for example, that Williams went to Pembroke College of Cambridge. See Gaustad, *supra* note 5, at 5. Pembroke College, of course, later became the model for the women's college, of that name, of Brown University in Providence, Rhode Island.

7. The fundamental notion of Puritanism was that man was depraved and could not be saved, but from the grace of God. See Edmund S. Morgan, *Roger Williams: The Church and the State* 11 (1967).

England.⁸ After graduating from Cambridge, Williams became a Separatist, the name given for those who left the Church of England to search for a "purer" church.⁹

By this time, under Charles I, the religious strife that would plague England most of the century had started.¹⁰ This strife, which included purges of religious and political dissenters, persuaded Roger Williams to leave England, as many Puritans had begun to do. In 1630, Roger Williams, with his wife, left England from Bristol, landing in Boston ten weeks later on February 5, 1631. For Williams, as many dissenters, the New World offered a haven for their beliefs and a new start.¹¹

Even before Williams left England, it would seem likely that many of his core beliefs had formed. Religious intolerance, as he experienced, was a terrible crime. Its remedy was freedom of conscience, which became Williams' cause. Government should punish crime, but never religious conscience or opinion. Williams' reputation as a learned and inspirational minister preceded him. The church in Boston extended a generous invitation to Williams to become their minister. But Williams rejected the offer because he found the church insufficiently separated from the Church of England and, therefore, to his thinking, impure. He did not want to officiate in a church with ties to the English Church.¹² This

8. See Guild, *supra* note 5, at 8.

9. See Morgan, *supra* note 7, at 17. These churches existed by covenant of the people with God. "God offered the covenant of grace to all who attained faith." *Id.* at 14. The covenanted people then strictly followed gospel, offering sacrament only to the religiously faithful. See *id.* at 16; see also Guild, *supra* note 5, at 8 (noting Williams' opposition to the established church).

10. The religious strife started under James I, and continued with Charles I. Charles I decided on a course of strong, monarchical rule, which included his contempt for popular sovereignty. His aim included the church, which he wanted to purge of all Calvinists, including the Puritans, and restore it along more Roman Catholic ways. See Guild, *supra* note 5, at 9. The battle was thus drawn between a Catholic oriented King and a Protestant Parliament. See Thomas J. Curry, *The First Freedoms, Church and State in America to the Passage of the First Amendment* 2 (1986).

11. The settlers carried their English pride to the New World. Many left Holland, which had treated them well, because they wanted to raise their children English, and not Dutch. See Morgan, *supra* note 7, at 81. There is also evidence that some settlers did not feel comfortable in the liberal climate of Holland, preferring a more ordered society. See *Museum Commemorates Pilgrims' Years in Exile in Holland*, Prov. J. Bull., Nov. 27, 1997, at A17.

12. Perhaps on account of his own experiences, Williams would remain hypersensitive to contacts with the Church of England throughout his life. Williams:

event confirmed his separatism. To his contemporaries, Williams was considered a rigid separatist and purist, unwilling to compromise in matters of faith.

From Boston, Williams went to Salem where he became an assistant to the minister of the oldest church in Massachusetts, which was independent of the Church of England.¹³ But almost immediately, the magistrates of Massachusetts Bay Colony interfered with his ministry.¹⁴ Their efforts were successful as Williams withdrew from Salem to quell the controversy. He went to Plymouth, beyond the jurisdiction of the Massachusetts Bay, where he was welcomed.¹⁵ He stayed in Plymouth for two years, preaching and speaking his mind. By and large, these were happy years. He became well-acquainted with Native Americans, transacting business with them, learning their language, and gaining their favor.¹⁶ His interaction with natives would remain a life-long interest that would gain him fame and respect.

He returned to Salem in 1633 to resume his ministry; some residents of Plymouth followed him.¹⁷ He was a popular minister. However, during his stay in Salem the controversy which led to his

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

Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. Rev. 455, 466 (1991).

13. See Guild, *supra* note 5, at 12.

14. Among other interferences, Massachusetts sent a letter to the church questioning their decision to hire Williams, since Williams had refused the offer of the Boston church and had, among other things, questioned the authority of government to punish religious offenses. See *id.* at 12-13. At the time of the colony's beginning, the General Court, including its magistrates, performed most of the functions of government, including legislative, executive, and judicial.

15. See *id.* at 16-17. The Puritans of Plymouth were more tolerant of religion, and also more alienated from the Church of England, than those of Massachusetts Bay. Thus, it was a better fit for Williams. In fact, in 1632, Massachusetts Bay passed a law that no one could enter the body politic unless they were a member of the church. While the colony later revoked the law, it evidenced the increasing theocratic nature of the colony. See *id.* at 16.

16. As Roger Williams put it, "God was pleased to give me a painful, patient spirit, to lodge with them in their filthy, smoky holes, even while I lived at Plymouth and Salem, to gain their tongue." *Id.* at 18.

17. There is some evidence of complaints about Williams in Plymouth, on suspected Anabaptist and rigid Separatist grounds. See *id.* at 17.

banishment ripened. By now, some of Williams' ideas were undoubtedly fixed. No human power had the right to interfere with conscience. Conscience was a matter strictly between a person and God. A church or a state may not prescribe religious faith. Expression of these views led him to confrontation with officials.¹⁸ The Salem church tried to protect Williams, but the controversy intensified.

In April 1635, the General Court, in Boston, summoned Williams to appear in order to answer charges that he refused to give an oath of loyalty to the colony, which Williams considered to be contrary to the rights of Englishmen; that he taught that the state should not enforce an oath on an unregenerate person since this would involve taking God's name in vain; and that, among other points, Williams contested the claim of the King to the land of the New World since Williams believed the Indians owned the land.¹⁹ Williams also denounced a colony law that required people to attend worship and support the church. "No one, . . . 'should be bound to maintain a worship against his own consent.'"²⁰ These events led to Williams' banishment for such "new and dangerous opinions."²¹ To the rulers of Massachusetts Bay, Williams was a

18. See *id.* at 19. In all other ways, especially over religious doctrine, Williams was a pretty orthodox Calvinist.

19. See *id.* at 20-23. Most of these positions were, of course, rooted in Williams' religious beliefs. Williams' opposition to oaths was grounded in his belief that they were an act of worship. Moreover, their indiscriminate administration in England convinced him of their arbitrariness. See generally Perry Miller, Rogers Williams: His Contribution to the American Tradition 19 (1965) (stating that, after Williams became a puritan, he rejected Anglican ceremonial and church government).

However, from the Puritan viewpoint, oaths were essential to the social fabric. Courts relied on oaths to obtain truthful testimony. The government used oaths to test for and, if necessary, purge insurgents. See Hall, *supra* note 12, at 466.

Equally threatening to the Puritans was Williams' challenge to their land claim, based on a grant from the King of England. Puritans feared that their opponents might succeed in having their royal patent annulled. See *id.* at 465. Thus, Williams was, in actuality, quite subversive of the Puritan social order.

20. Guild, *supra* note 5, at 23 (quoting Roger Williams).

21. *Id.* at 27 (quoting the Act banishing Roger Williams). The General Court listed four offenses of opinion that formed the basis of Williams' banishment. These were, first, that magistrates should not punish breaches of the first four commandments (known as the First Table), which dealt with religious matters, like keeping the Sabbath holy and not blaspheming God, unless the breaches disturb civil peace. This reflected Williams' belief that government had no authority over religion, a theory he kept his whole life. The second offense was that magistrates ought not to tender oaths to the unregenerate (people who had not received salva-

nuisance and subversive.²² To Williams, Puritan society was insufficiently pure.

To his Puritan contemporaries, Williams seemed an eccentric, if not dangerous, man.²³ His opinions and actions rattled the Puritan social order. Having left England for religious principle, he now found himself in the same position, involuntarily, with respect to Massachusetts. Roger Williams had become the country's first rebel. As a rebel, Williams was a pretty admirable figure. He acted out of principle; his actions were consistent with his words, despite the cost, which was considerable. So the long American spirit of rebellion started on a firm basis.

Ordered out of Massachusetts in the dead of winter, Roger Williams made his way southward to escape the authorities, first to Seekonk, Massachusetts, and then to the area beyond Massachusetts, outside of its jurisdiction, which he called "Providence," in appreciation of his deliverance, where he landed by boat, in June 1636.²⁴ Williams acquired land from Native Americans, with whom he was friendly and who trusted him, in consideration of his "many kindnesses and services" to them and their friends.²⁵ This was a sign of the high respect the Indians held for Williams. In late 1638, he was publicly immersed in a "rebaptism." He founded

tion), as mentioned. Third was that a person ought not to pray with the impure and, fourth, that a person should not give thanks after sacrament or a meal. See *id.* at 23. These ideas were rooted in Puritanism and Separatism. Yet, even for these theologies, these beliefs were, for the day, quite radical, challenging Puritan ideas to the core. See Morgan, *supra* note 7, at 27.

22. See Miller, *supra* note 19, at 27.

23. The name of Roger Williams has been handed down to us by Puritan writers loaded with reproach. "He is described . . . as a rigid Brownist, precise and uncharitable; and of the most turbulent and boisterous passions." Guild, *supra* note 5, at 47. To his contemporaries, "Williams was a recognizable—and tedious—type: one who took the Bible with a foolish literalness." Miller, *supra* note 19, at 26. "He was the worst kind of virtuous man, a perfectionist who made dogmas out of purity and demanded that the rest of the world conform to him rather than he to them." *Id.* at 26-27.

24. In all of this, Williams outran the authorities, who had sent a ship to Salem to transport him to Boston, where he would be exiled to England. See Guild, *supra* note 5, at 32-33. His friend, John Winthrop, directed him away from Massachusetts and toward Narragansett Bay, Rhode Island. See *id.* at 33-34.

25. *Id.* at 34 (footnote omitted). "I spared' . . . 'no cost towards them, and in gifts to . . . [them] . . . tokens and presents many years before I came in person to the Narragansett; and when I came, I was welcome . . . to the old prince . . . who was most shy of all English, to his last breath.'" "It was not' . . . 'thousands, nor tens of thousands of money could have bought of him . . . an English entrance to this Bay.'" *Id.* (quoting Roger Williams).

the first Baptist church in North America, in Providence, although he did not stay a Baptist long.²⁶

With the influx of emigrants into the colony of Providence, it became necessary to establish a government. In 1638, Williams helped draw up a model for government, based on democratic principles for the small township. The paper constituted an agreement between the original settlers and "newcomers," subjecting them to obedience "only in civil things."²⁷ By 1640, settlement had proceeded to such a point that town business could no longer be decided by general town meeting. Articles of government were drawn up. Prominent among the principles was "[w]e agree, [a]s formerly hath been the liberties of the town, so still, to hold forth liberty of conscience."²⁸ As later confirmed by colonial legislation, in Newport, liberty of conscience was made the basis of the law for the first time in the western world.²⁹

Yet, Rhode Island's troubles were not over. Authorities from the neighboring New England colonies of Massachusetts Bay, Plymouth, and Connecticut formed a military alliance, called the United Colonies. This alliance pointedly excluded the Narragansett Bay towns of Providence, Portsmouth, Newport, and Warwick. Viewing this as a threat to their land, the residents of the Narragansett colony asked Williams to go to London to secure a charter for their colony, which he did, traveling by way of New York to avoid Massachusetts. By this time, in 1642, Charles I had fled London and Civil War had begun. So Williams went to Parliament to secure the patent, which was ruling in the King's stead.³⁰

With time on his hands, Williams wrote, by "a rude lamp at Sea," *A Key into the Language of America*,³¹ which was published

26. The church was among the earliest Baptist churches in the world, the first having been established in London in 1611.

27. Guild, *supra* note 5, at 38 (footnote omitted); accord Gaustad, *supra* note 5, at 48-49.

28. Guild, *supra* note 5, at 38-39 (source unknown).

29. As Justice Story noted, "we read for the first time . . . the declaration, that 'conscience should be free, and men should not be punished for worshipping God in the way they were persuaded he required,'—a declaration, which, to the honor of Rhode Island, she has never departed from." *Id.* at 39 (footnote omitted).

30. I am indebted to Professor J. Stanley Lemons, of Rhode Island College, for insight into this early history of Rhode Island.

31. Roger Williams, *A Key into the Language of America* (J. Hammond Trumbull ed., 1866) (1643) [hereinafter *Key*], reprinted in 1 Complete Writings, *supra* note 1, at 77, 79.

when he arrived in London in 1643. This book made him famous overnight. It was the first work written, in English, on the language and customs of Native Americans. He had translated, in effect, the ways of the New World for the Old, hoping to "unlock some *Rarities* concerning the *Natives* themselves, not yet discovered."³² Significantly, *Key* gave Williams credibility, which he would later need in his religious battles.

Williams arrived in London in the middle of the Civil War. The affairs of the colonies were run by a Parliamentary commission, which included, as members, Henry Vane, a leader in the House of Commons and an advocate, like Williams, of religious freedom, Oliver Cromwell and John Pym. Vane became a close friend of Williams, and was instrumental in his cordial reception by the commission, which granted him, in the name of the King, a charter for Rhode Island, dated March 14, 1644, giving "Providence Plantations in the Narragansett Bay" full power to rule themselves" as they preferred.³³

Williams stayed on in London to publish his masterpiece, *The Bloody Tenent, of Persecution, for Cause of Conscience*,³⁴ his famous cry for cause of conscience written in response to his archrival, John Cotton, a prominent churchman of Massachusetts Bay. The book was hastily written and published, known perhaps more for the title than a reading of its contents.³⁵ While published

32. *Id.* at 79. Williams hoped *Key* would improve communication among Europeans and Indians. In the language of the Narragansett, the book meant "lost" in a physical sense, but also carried the additional meaning of lost in a spiritual sense.

33. Guild, *supra* note 5, at 40-41 (quoting the Charter of 1644). The charter declared:

[N]o person within the said colony, at any time hereafter, shall be any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, and do not actually disturb the civil peace of our said colony; but that all and every person and persons may . . . freely and fully have and enjoy his and their own judgments and consciences, in matters of religious concerns . . . they behaving themselves peaceably and quietly, and not using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others. Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution in the United States and Bill of Rights 170 (Richard L. Perry & John C. Cooper rev. ed. 1959).

34. Roger Williams, *The Bloody Tenent, of Persecution, for Cause of Conscience* (Samuel L. Caldwell ed., 1867) (1644) [hereinafter *Bloody Tenent*], reprinted in 3 *Complete Writings*, *supra* note 1, at 1.

35. See Gaustad, *supra* note 5, at 69.

anonymously, everyone knew he was the author. While initially the book was publicly burned, it later caught on, attracting great attention.³⁶ The book made Williams' reputation in matters of religion. He was a famous man in London, author of two well-regarded books, *Key* and *Bloody Tenent*.³⁷

With his charter in hand, Roger Williams returned to the New World, arriving in Boston on September 17, 1644. Armed with a letter of safe passage from Parliament, Williams made his way through Massachusetts, returning in triumph to Rhode Island. "The news of his arrival had preceded him, and at Seekonk the inhabitants of Providence met him with a fleet of fourteen canoes, to welcome his return and convey him in triumph to his home."³⁸ This may well have been his greatest moment.

The several towns of Providence Plantations gathered to form a new government, based on the charter, which it did in May 1647, in Portsmouth. The framers adopted a democratic form of government, a legal system based on English law, and concluded their compact with the memorable words "all men may walk as their consciences persuade them, every one in the name of God."³⁹

In 1645, Roger Williams again preserved peace among native tribes and prevented war with the settlers. In 1649, he was chosen Deputy President of the colony, but declined.⁴⁰ In November 1651, he again traveled to London with his great friend, the Baptist John Clarke, to confirm the Rhode Island charter by Parliament after the beheading of Charles I. During this visit, he again used the occasion to publish three of his works, in 1652. The *Bloody Tenent Yet More Bloody*⁴¹ was a response to Cotton's reply to his *Bloody Tenent*. The *Hireling Ministry None of Christs*⁴² was rushed into print to influence the English debate over religious freedom, ad-

36. See *id.* at 85.

37. See Miller, *supra* note 19, at 101. Also published at this time in 1644, in London, were Cotton's *Letter Examined*, *supra* note 1, and Roger Williams, *Queries of Highest Consideration* (Reuben Aldridge Guild ed., 1867) (1644) [hereinafter *Queries*], reprinted in 2 Complete Writings, *supra* note 1, at 251.

38. Guild, *supra* note 5, at 42.

39. *Id.* at 42-43.

40. See *id.* at 43.

41. Roger Williams, *The Bloody Tenent Yet More Bloody* (Samuel L. Caldwell ed., 1870) (1652) [hereinafter *Yet More Bloody*], reprinted in 4 Complete Writings, *supra* note 1, at 1.

42. Roger Williams, *The Hireling Ministry None of Christs* (1652) [hereinafter *Hireling*], reprinted in 7 Complete Writings, *supra* note 1, at 147.

dressed especially to Cromwell. Finally, he published *Experiments of Spiritual Life and Health*,⁴³ addressed to his wife to console and aid her in matters concerning spiritual life. With his previous publication of *Key*, in 1643, and correspondence with John Cotton, in 1644, and *Bloody Tenent*, in 1644, Williams' reputation, especially in the Old World, but also in the New, was secure. Thus, when these later works came out, they had a ready reception.

Williams stayed in London over two years, supervising the publication of his work, engaging in the debates of the day, and visiting with friends. He especially enjoyed the hospitality of Henry Vane, and became quite friendly with Cromwell, John Milton, and other leading figures.⁴⁴ Williams was conversant in Hebrew, Greek, Latin, French, and Dutch. He taught Milton Dutch; Milton refreshed Williams' knowledge of Hebrew, Greek, and Latin. He made a strong impression in learned circles, as well he should; after all, he was one of them, a sophisticated Englishman.⁴⁵ With his literary accomplishments, and elite circle of friends, he was riding high.⁴⁶

While away, Providence had again fallen into disunity and rancor, if not anarchy.⁴⁷ In this context he composed his famous *Letter to the Town of Providence*,⁴⁸ expressing his "ideal of a reasonable society in the wilderness."⁴⁹ The letter had some effect on moderating the passions of the community, and played a role in his election as President, an office he held for over three years.

43. Roger Williams, *Experiments of Spiritual Life and Health* (1652) [hereinafter *Experiments*], reprinted in 7 Complete Writings, *supra* note 1, at 45.

44. In fact, Williams could have pursued a closer relationship with Cromwell, if not for his rigid and purist views and his disinclination to hone or apply political skills. Cromwell and the Independent clergy, such as John Owen, could easily have embraced him, or he them, had Williams been more willing to align himself with such tolerationists. The Parliament of the time was rife with discussion about the direction of religion in England. See Miller, *supra* note 19, at 192-93.

45. See Gaustad, *supra* note 5, at 62; Guild, *supra* note 5, at 43-44.

46. See Miller, *supra* note 19, at 167.

47. Stable government was difficult to achieve in Rhode Island. Since the colony was established on liberty of conscience, law and order had to be founded on a basis other than religion. The settlers were fiercely independent and divergent in religious and political views. There was a constant threat of attack from Indians and, also, from the neighboring colonies of Massachusetts and Connecticut. Moreover, there was a fierce rivalry among the towns of Newport, Portsmouth, Providence, and Warwick. See Hall, *supra* note 12, at 476.

48. Letter from Roger Williams to the Town of Providence (August 1654), reprinted in Miller, *supra* note 19, at 221.

49. *Id.*

With the end of his presidency, Williams, now in his fifties, slowly withdrew from public life. He still rose to the occasion, however, when the need arose. In 1670, he addressed a famous letter to John Mason, an old acquaintance, to help quell a dispute between Rhode Island and Connecticut over Rhode Island's western border.⁵⁰ His last major event was a debate with Quakers, over religious doctrine, held over three days in Newport and Providence. This he published, in 1676, as *George Fox Digg'd Out of His Burrowes*.⁵¹ *George Fox* was the only book he published in America. He died in 1683, at age eighty-four.

While alive, Roger Williams was widely considered "rigid," "turbulent," and "boisterous."⁵² Today, however, we associate Williams with freedom of conscience. This, his fundamental idea, became a foundation for the country. Less well known, his religious thought also included respect for other consciences, resulting in equality of faith and toleration, freedom to worship, and the nonestablishment of a national church. These ideas formed the basis on which he founded Rhode Island as a religious haven. He was, undoubtedly, the deepest American thinker on church and state in the period before the Constitution. Beyond this, Roger Williams speaks to us today as a man who sought to protect the inviolability of his soul amidst the challenges of his world, which were quite formidable.⁵³ Part II turns to an elaboration of Williams' ideas.

II. THE RELIGIOUS THOUGHT OF ROGER WILLIAMS

Roger Williams was an obstinate man in thought, and in person. He had a core set of religious beliefs, which he advocated consistently over his life, with tenacity, passion, and commitment. His philosophy never waned, from the appearance of his first major religious works, *Bloody Tenent* and *Queries* in 1644, to his last, *George Fox*, in 1676. His writing is sometimes difficult to pene-

50. See Letter from Roger Williams to Major John Mason (June 22, 1670), reprinted in Miller, *supra* note 19, at 227.

51. Roger Williams, *George Fox Digg'd Out of His Burrowes* (Rev. J. Lewis Diman ed., 1872) (1676) [hereinafter *George Fox*], reprinted in 5 *Complete Writings*, *supra* note 1, at 1.

52. Guild, *supra* note 5, at 47. Cotton thought Williams "self-pleasing," "self-willed," and a "haberdasher of small questions." Miller, *supra* note 19, at 165.

53. Consider that Williams had to found a new society, while under constant threat, and fight serious doctrinal and political challenges.

trate. Written feverishly, often hurriedly, his arguments do not unfold logically, the grammar is often poor, the style dense.⁵⁴ Yet, by deciphering his language, somewhat like he once did of Native Americans, the originality of his thought may be uncovered.

His philosophy is clear: liberty of conscience is an indissoluble aspect of being human because it is a person's medium to communicate with God; therefore, it is sacred. No forced intrusion is permissible since to persecute conscience is to violate God's work. That argument, phrased from the theological perspective of Roger Williams, formed a basis for the liberty of conscience enshrined in the First Amendment protections of religion. Significantly, Roger Williams articulated these thoughts on conscience some fifty years before John Locke⁵⁵ and about 150 years before James Madison's famous *Memorial and Remonstrance Against Religious Assessments* [hereinafter *Memorial*]⁵⁶ and the framing of the First Amendment.

Yet, while freedom of conscience was the central principle of Roger Williams, it was not the only part of his religious philosophy, nor his only contribution to American thought. Since conscience was inviolable, a person, acting officially or privately, had essentially no choice when faced with an act of conscience: one person must respect the conscience of another. In Williams' view, this was a means to protect the integrity of religion, and preserve social peace. Moreover, this idea extended to all people. There was an equality of status in matters of faith and conscience. This idea of toleration amidst diversity too has become a foundation for American thought.⁵⁷

54. See Miller, *supra* note 19, at 101, 103. One historian observes that sentences were without predicate, the syntax defies analysis. See Morgan, *supra* note 7, at 4. "At its worst, Williams' prose is tangled and convoluted. At its best, it is dense and exhilarating. But only rarely is it ever crystal clear." Glenn W. LaFantasie, *Roger Williams: The Inner and Outer Man*, 16 Canadian Rev. Am. Stud. 375, 379 (1985).

55. See John Locke, *A Letter Concerning Toleration*, in *Treatise of Civil Government and A Letter Concerning Toleration* (Charles L. Sherman ed., 1965).

56. See *Everson v. Board of Educ.*, 330 U.S. 1 app. at 63-72 (1947) (quoting *Memorial*).

57. See *Lee v. Weisman*, 505 U.S. 577, 590 (1992). "To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Id.*

Williams did not leave these ideas to depend on their innate attraction to adherents. His life had taught him the dark side of human nature. Thus, other precautions were necessary, he learned. This led him to think deeply upon the role of government in relation to religion, yielding an institutional strategy. His most famous strategy was separation: to protect the garden of religion from the "[w]ilderness of the world."⁵⁸ This strand of thought formed the evangelical influence on the nonestablishment strategy of the First Amendment that complemented the more secular theories of Madison and, especially, Jefferson. Here too, Williams did not rely on one strategy. Beyond separation, Williams argued to distinguish religion from government by identifying their respective characteristics and natural jurisdictions; a separation of functions argument later advocated by Madison.⁵⁹ Moreover, he argued against the establishment of a national church, reasoning from his experiences with forced orthodoxy in Old England and New England.

These are the main ideas of Roger Williams, which this Part II will examine. These ideas, interestingly, can be grouped into strategies of individual and institutional protection for religious freedom. Individual protections are those of conscience and tolerance. Institutional protections include separation, different jurisdictions for church and state, and the nonestablishment of national churches. This Part will discuss Williams' ideas in this order.

A. *Individual Protections of Religious Freedom*

1. *Cause of Conscience*

Roger Williams learned the cause of conscience firsthand, through many painful experiences, including, most prominently, his banishment from Massachusetts Bay. Williams saw this as payment for his acts of conscience.⁶⁰ This searing experience was the defining event of his life.

His philosophy bloomed in the pivotal year 1644, while in London securing a charter for Rhode Island. Three important works were published, in London, that dealt with religious freedom and cause of conscience: *Cotton's Letter Examined*, *Queries*, and

58. Cotton's *Letter Examined*, *supra* note 1, at 392.

59. See *infra* note 195.

60. See Miller, *supra* note 19, at 94. Cotton saw Williams as a heretic.

Bloody Tenent. Each of these served a different purpose. *Cotton's Letter Examined* allowed Williams to respond to Cotton over his banishment, thereby introducing the theme of cause of conscience to Londoners.⁶¹ In *Queries*, Williams addressed Parliament over its argument on religious freedom, hoping to influence that debate.⁶² *Bloody Tenent*, released anonymously, responded to Cotton's philosophy, point by point, and advocated further the cause of conscience to Parliament.⁶³

"I plead the cause of truth and innocency against the bloody doctrine of persecution for the cause of conscience" asserts Williams in *Bloody Tenent*,⁶⁴ which best encapsulates his argument. By "persecution for the cause of conscience," Williams means that it is "spiritual rape"⁶⁵ to coerce people to faiths or beliefs they do not voluntarily subscribe to. It is, for example, "a spiritual rape [to] force the consciences of all to one worship,"⁶⁶ or "to batter down idolatry, false worship, [or] heresy, [with] . . . weapons [such as] . . . stocks, whips, prisons, [or] swords."⁶⁷ Such "*Soule or Spiritual*

61. Cotton and Williams had a long history. Each started out in English parishes quite close to one another, before emigrating to America. In Massachusetts Bay, of course, Cotton was the leader Williams most held responsible for his banishment. Cotton tried to explain the reasons for Williams' banishment in a letter to Williams, which "mysteriously" appeared, in print, in London during Williams stay abroad. It does not appear that Williams was responsible for publishing the letter. Conveniently, however, Cotton's letter served to provide Williams with a ready audience for his *Cotton's Letter Examined*, which appeared four days before *Queries*.

62. The main split was between Presbyterians and Independents, who Williams admonished to "refrain from cutting each other's throats" and also of Catholics, who "should be tolerated." Miller, *supra* note 19, at 80.

63. Everyone knew Williams was the author. See *id.* at 101. It may have been courageous, or foolish, for Williams to address Parliament, since Parliament was controlled by Presbyterians, who, he thought, later caused the book to be burned. See *id.* at 102. Yet, the English debate over religion was complicated, involving many strands, and Williams' purpose seemed as much to influence the debate in England generally, including among circles outside Parliament, especially among the Puritan and Independent groups. See *id.* at 101-02. Williams continued these themes his whole life. For example, in 1652, he published *Hireling*, which was designed to influence Cromwell over freedom. Williams, and others, had a measure of success in these efforts, as many people "arrived at conclusions as radical as Williams'." *Id.* at 193.

64. *Id.* at 109 (quoting from an excerpt of *Bloody Tenent*).

65. *Id.* at 83 (quoting from an excerpt of *Queries*).

66. *Id.*

67. *Id.* at 131 (quoting from an excerpt of *Bloody Tenent*).

Rape" is worse than "to force and ravish the Bodies of all the Women in the World."⁶⁸

At the root of this cry for conscience lie several premises integral to his thought. First, and for Williams foremost, conscience is a gift of God, God's voice within man. As such, conscience forms our path to God. Through conscience, genuine acts of faith may occur. It is the basis by which one becomes a true believer, finding one's path to salvation. For such believers, as Williams, faith is a matter of obligation to divine grace.⁶⁹ For Williams, there is no real choice in this; conscience is your duty to God, and your guide in life. The freedom envisioned is the freedom to do God's will. This freedom is preeminently rooted in religious belief, a spirituality emanating from God, not man. This is what Williams means by "soul liberty." These thoughts form a justification both for the purpose and importance of religion.

Second, "conscience . . . [is] a persuasion fixed in the mind and heart of man, which enforceth him to judge . . . and to do so and so with respect to God, His worship."⁷⁰ As such, conscience is an indispensable, constitutive aspect of being human. For a believer, like Williams, it is the soul of man. "This conscience is found in all mankind, more or less: in Jews, Turks, Papists, Protestants, pagans."⁷¹ Conscience is a universal element of the human condition.

68. Bloody Tenent, *supra* note 34, at 182. Williams considered the idea of persecution as "the deflowering of chaste soules." *Id.* at 60. Williams further felt forcing worship was a "ten thousand fold" greater sin than for "a natural Father [to] force his daughter, or the Father of the Commonweal[th] [to] force all the maydens in a Country to the marriage beds of such and such men whom they cannot love." *Id.* at 259.

69. Williams was a Calvinist. Calvin "defined conscience as knowledge (*scientia*) accompanied by a sense of divine justice, and added 'it is a kind of medium between God and man.'" Morgan, *supra* note 7, at 130 (quoting 2 Institutes of the Christian Religion 75 (John Allen trans., 1732)). Such notion of conscience was at the center of Puritan theology. For Puritans, conscience "represented the voice of God in man . . . the source of natural knowledge of God's will by which man as originally created could have known what was right and wrong." *Id.* Thus, since conscience was divine, man must respect it, whether it was right or wrong. *See id.* Williams subscribed, in essence, to this thinking. So, in actuality, he was more of a standard Puritan thinker, in this respect, than seems generally appreciated. *See id.* at 133.

70. Letter from Roger Williams to Major Endicot, Governor of Massachusetts (August 1651) [hereinafter Letter to Endicot], *reprinted in* Miller, *supra* note 19, at 158, 159.

71. *Id.*; *see also* Morgan, *supra* note 7, at 133-34 (stating that every man has a conscience).

Yet, while conscience is universal, men and women guided by conscience are rare.⁷²

Third, for these reasons, intrusion into conscience is a serious affront to religious liberty and, also, to human dignity. From a religious standpoint, persecution is an unchristian, unreligious act.⁷³ Since conscience is the medium of communication between God and man, its violation infringes on God's domain. No true church would deny believers the ability to practice their faith. Any religion that benefits from force over faith is not a true religion.⁷⁴

Moreover, since a religious conversion must involve an actual change of heart, Williams denied that "the Arm of Flesh" or the "Sword of Steel" could ever "reach to cut the darkness of the Mind, the hardness and unbelief of Heart, and kindly operate upon a Souls affections to forsake a long continued Fathers worship, and to embrace a new, though the best and truest."⁷⁵ Persecution could only force worship, causing hypocrisy in belief.⁷⁶

There is a related human rights component to this too, which Williams recognized. People are "[not] for their conscience and

72. See Morgan, *supra* note 7, at 133-34.

73. "[I]f thou huntst any for cause of conscience, how canst thou say thou followest the Lamb of God who so abhorred that practice?" Miller, *supra* note 19, at 109 (quoting an excerpt of *Bloody Tenent*); see also *Bloody Tenent*, *supra* note 34, at 425 (noting persecution is "most evidently and lamentably contrary to the doctrine of *Christ Jesus the Prince of Peace*").

74. "[T]hat Religion cannot be true which needs such *instruments of violence* to uphold it." *Bloody Tenent*, *supra* note 34, at 139. There was a related institutional aspect to Williams' argument against persecution. History, Williams believed, showed that force favored orthodox, but false, religion. Thus, force smothered "true" religion. True believers were invariably the objects of state persecution. Williams' argument against persecution is, one can see, actually a way to protect dissenting and minority views, such as Williams' brand of separatism. See Morgan, *supra* note 7, at 141 (discussing Williams' view that the exercise of conscience, free of force, was the only process by which one could reach the true God).

75. *Bloody Tenent*, *supra* note 34, at 354; see also Hall, *supra* note 12, at 470 (noting Williams' idea of religious conversion was more a change of one's heart and soul rather than a mere "mental reorientation").

76. "[F]orc't Worshpp stincks in Gods Nostrills." Hall, *supra* note 12, at 470 (quoting Letter from Roger Williams to Major John Mason and Governor Thomas Prentice (June 22, 1670), reprinted in 2 *The Correspondence of Roger Williams* 617 (Glenn W. LaFantasie ed., 1988)). It "may make . . . a whole Nation of Hypocrites." *Bloody Tenent*, *supra* note 34, at 136. Moreover, such hypocrisy could have the "further, tragic consequence," as Professor Hall notes, of "harden[ing]" people's souls "in a dreadful sleep and dream of their own blessed estate, and [sending] millions of souls to hell in a secure expectation of a false salvation." Hall, *supra* note 12, at 470-71 (quoting from *Bloody Tenent*).

religion . . . [to] be choked and smothered, but suffered to breathe and walk upon the decks in the air of civil liberty and conversation in the ship of the commonwealth, upon good assurance given of civil obedience to the civil state."⁷⁷ Forbearance of violence to cause of conscience should, therefore, be laid "as the Magna Charta of the highest liberties . . ."⁷⁸ The "civil state is bound before God to take off that bond and yoke of soul-oppression and to proclaim free and impartial liberty to all the people . . ."⁷⁹ Through such liberty, Williams posited that civil peace might be secured. "I affirm that that state policy and state necessity which (for the peace of the state and preventing of rivers of civil blood) permits the consciences of men will be found to agree most punctually with the rules of the best politician that ever the world saw . . ."⁸⁰ For these reasons, it follows that application of force to conscience constitutes "spiritual rape"⁸¹—what Williams called "the bloody tenent."⁸²

A final point on conscience goes to Williams' description of its reach. In contemporary terms, this involves ascertaining the boundaries, if any, of free exercise of religion. One important theoretical question is answered quickly. Matters of conscience extend beyond questions of belief. "By persecution for cause of conscience, I . . . mean either for professing some point of doctrine which you believe in conscience to be the truth, or for practicing some work which you believe conscience to be a religious duty."⁸³ For Roger

77. Miller, *supra* note 19, at 140 (quoting from an excerpt of Bloody Tenent).

78. *Id.* at 144.

79. *Id.* at 204 (quoting from an excerpt of Hireling).

80. *Id.* at 135 (quoting from an excerpt of Bloody Tenent).

81. *Id.* at 83 (quoting from an excerpt of Queries). "Only let it be their souls choice, and no inforcing Sword, but what is spiritual in their spiritual causes." Hireling, *supra* note 42, at 154.

82. Miller, *supra* note 19, at 143 (quoting from an excerpt of Bloody Tenent)

[T]he blood of souls compelled and forced to hypocrisy in a spiritual and soul rape, so deeply guilty of the blood of the souls under the alter, persecuted in all ages for the cause of conscience, and so destructive to the civil peace and welfare of all kingdoms, countries, and commonwealths.

Id. All men hate persecution.

83. *Id.* at 114 (quoting from an excerpt of Bloody Tenent). Williams, through the character of Truth, goes on to say:

I desire it may be well observed that this distinction is not full and complete: for besides this, that a man may be persecuted because he holdeth or practiceth what he believes in conscience to be a truth . . . I say besides this, a man may also be persecuted because he dares not be

Williams, it is clear that conscience encompasses both belief ("professing some point of doctrine which you believe in conscience to be the truth") and action ("practicing some work which you believe in conscience to be a religious duty").

Matters of belief are pretty straightforward. These are the inward directed acts of conscience, constituting peoples' communication with God. According to Williams, this involves "professing some point of doctrine." For example, in *Yet More Bloody*, Williams identified as persecutions for cause of conscience fines, whippings, and banishments on account of belief,⁸⁴ punishing people for not attending church,⁸⁵ withdrawal of civil privileges because of belief,⁸⁶ and requiring to support with taxes a religion or worship in which one does not believe.⁸⁷

The reach of actions (or work) is less clear. The best evidence of what Williams means by conscience-based acts is his famous 1655 *Letter to the Town of Providence*,⁸⁸ known as the *Ship of State Letter*, where he addresses the citizens of the colony, some of whom were rebelling against the town's attempt to establish a regular militia. In the letter, Williams analogizes a commonwealth to a ship at sea.⁸⁹ "[B]oth Papists and Protestants, Jews and Turks, may be embarked in one ship."⁹⁰ Thus, for these and all people, "none . . . be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they

constrained to yield obedience to such doctrines and worships as are by men invented and appointed.

Id.

84. *Yet More Bloody*, *supra* note 41, at 85.

85. *See id.* at 59.

86. *See id.* at 414.

87. *See id.* at 301-04, 366; *see also* Hall, *supra* note 12, at 473 (citing same).

88. *See* Letter to the Town of Providence (January 1655) [hereinafter *Ship of State Letter*], *reprinted in* Miller, *supra* note 19, at 225. The letter appears to have arisen out of the colony's attempt, in 1654, to establish a militia. Some residents objected to compulsory military service, at least partially on religious grounds. It is unclear whether the dissenters were advocating a conscience-based exemption from military service or a more general exemption from civil punishment. Since the latter position might result in civil anarchy, it would make Williams' response more understandable. *See* Hall, *supra* note 12, at 485.

89. "There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth or a human combination or society." *Ship of State Letter*, *supra* note 88, at 225 (footnote omitted).

90. *Id.* at 225-26.

practice any."⁹¹ This definition of conscience reveals again the core of Williams' belief that a person must have the ability to believe and practice the person's faith—both affirmatively in the way one chooses and, negatively, as protection against compulsion. This definition accords substantially with his view in *Bloody Tenent*.⁹²

"[N]otwithstanding this liberty," Williams asserts further in the *Ship of State Letter*:

[T]he commander of this ship ought to command the ship's course, yea, and also command that justice, peace, and sobriety be kept and practiced, both among the seamen and all the passengers. If any of the seamen refuse to perform their services, or passengers to pay their freight; if any refuse to help, in person or purse, towards the common charges or defense; if any refuse to obey the common laws and orders of the ship concerning their common peace or preservation if any shall mutiny and rise up against their commanders and officers; if any should preach or write that there ought to be no commanders or officers because all are equal in Christ . . . I say . . . the commander or commanders may judge, resist, compel, and punish such transgressors according to their deserts and merits.⁹³

This passage indicates that there are limits, in Williams' view, to liberty of conscience. That liberty must be compatible with civil peace. Stated differently, religion may not threaten "common peace or preservation."⁹⁴

At first glance, this would appear to be a constrictive view of religious freedom, calling, as it does, for limiting freedom to "common laws and orders." Certainly there was some justification for this. The small colony of Rhode Island was under threat by its larger neighbors, Massachusetts and Connecticut. The "common defense" and "preservation" was, in fact, at issue, requiring all res-

91. *Id.* at 226.

92. See Miller, *supra* note 19, at 114. "By persecution for cause of conscience, I . . . mean either for professing some point of doctrine which you believe in conscience to be the truth, or for practicing some work which you believe in conscience to be religious duty." *Id.* (quoting from an excerpt of *Bloody Tenent*).

93. *Ship of State Letter*, *supra* note 88, at 226.

94. *Id.* The letter clearly reveals Williams' commitment to the Puritan idea that government should enforce morality. As Professor Morgan observes, Williams' idea of liberty of conscience exists within the context of the magistrate's duty "to punish anyone whose conscience led him to undertake actions against the public safety and welfare." Morgan, *supra* note 7, at 134.

idents to do their part. There is also evidence that the letter, written toward the end of Williams' life, reflected his disillusionment about finding real truth in life.⁹⁵

Yet, a closer look at the passage indicates that it may have been meant in a more freedom enhancing way. First, the passage reveals Williams' philosophy of trying to delineate the boundaries of religion from civil jurisdiction as a means of protecting religion and securing civil peace.⁹⁶ Belief in religion did not entitle one to violate the social order. Second, the reach of conscience must be measured against the "commands of justice and peace," particularly "the common laws and orders of the ship concerning their common peace or preservation." At a minimum, this would seem to call for some justification that a claim of "common peace or preservation" is weightier, in the circumstances, than a claim of conscience.⁹⁷ Certainly not every "common law" would meet that standard. Moreover, the context of the letter—threat to war and disorder—demonstrates the easy case for "common defense."

There is also evidence that Williams did not like the Quakers' display of nakedness in public, which Quakers believed their inner light directed them to do as a way of symbolizing the spiritual state of divergent believers.⁹⁸ Public nudity, for Williams, was deeply

95. According to Perry Miller, the letter evidenced Williams' deepening sense of the gulf between the "perfection of the antitypical church and the miserable reality of the wilderness." Miller, *supra* note 19, at 225.

96. The philosophy of separating religion from society as a means of protecting both from one another will be discussed. See *infra* notes at 127-43. In fact, Professor Hall observes, "a more convincing explanation of the letter . . . is that Williams simply chose a metaphor which—although powerful—was an imperfect analogy with which to elaborate his broader views about civil duty and religious conscience, and that his letter failed to address a host of unanswered questions about the subject." Timothy L. Hall, *Separating Church and State* 109 (1998) (footnote omitted).

97. Roger Williams did not speak directly to this issue in his time. It is difficult to apply his ideas to current free exercise controversies.

98. The Quakers provoked the outrage of authorities, on both sides of the Atlantic, through their radical, even bizarre, behavior. It was their practice, for example, to interrupt church services to testify against false worship. Thus, the authorities of New England, and England, strove to insulate their jurisdictions from the influence of Quakers. Led by Massachusetts, the colonies of the region passed legislation prohibiting Quakers from entering their territory. Those jurisdictions also expelled and punished those Quakers who did venture into their domain, and censored and banned their books. For these reasons, these colonies feared Rhode Island, which extended refuge to Quakers, as all groups, believing that the contagion would effect the whole region. This also fortified the New England colonies' view of Rhode Island as aberrant. See Curry, *supra* note 10, at 21.

offensive, betraying perhaps his Puritan background.⁹⁹ From this we might more clearly ascertain another outer limit on religious practice. Public nudity, or similar conduct threatening public peace (in the Puritan world-view), such as uncleanness or immodesty,¹⁰⁰ is not justified, even by religious conviction. Williams also condemned human sacrifice.¹⁰¹ Law and order, thus, again comes into bold relief as a limit to religion.

Given that Williams does not look favorably on threats to law and order, it seems reasonable to conclude that current controversies, such as the smoking of peyote¹⁰² or the sacrifice of animals,¹⁰³ would likely not fare well under Williams' view. Such hard questions are not, obviously, addressed by Williams. Nor are other ones regularly encountered by the Supreme Court—questions like littering on the street,¹⁰⁴ proselytizing,¹⁰⁵ or exemption from general laws.¹⁰⁶

99. See Morgan, *supra* note 7, at 135.

100. See Roger Williams, *The Examiner Defended* (1652), reprinted in 7 Complete Writings, *supra* note 1, at 195, 243.

101. See *id.*

102. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

103. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

104. See *Schneider v. State*, 308 U.S. 147 (1939).

105. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

106. See *Reynolds v. United States*, 98 U.S. 145 (1879). In American free exercise law, a serious debate has been over whether protection covers matters of belief only, or also extends to faith-based acts. Initially, the Court, in *Reynolds* confined First Amendment protection to matters of belief. The Court reasoned, under the First Amendment:

Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

Id. at 164, 166; accord *Cantwell*, 310 U.S. at 303-04 (stating the Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.") (citing *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds*, 98 U.S. 145).

It took over 100 years for the Court to extend definitive protection to acts of faith too. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court recognized that a law that conditioned receipt of unemployment benefits on a willingness to work Saturdays, which the claimant asserted violated her beliefs, "forces her [the claimant] to choose between following the precepts of her religion and forfeiting benefits,

From Williams' view, it is perhaps not so surprising that he did not address these matters in detail. In his time, it was a serious and risky battle to fight over acts of faith, as evidenced by his own life experiences. The establishment of the Providence colony itself as a place of toleration and freedom of religion was the western world's first experiment with the idea of whether liberty of conscience could coexist with civil peace. Thus, we can see clearly that Williams was addressing foundational questions of religious freedom: conscience as a freedom comes before protection of faith-based actions.

Furthermore, Williams had a dim view of Roman Catholics, whom he feared, as most Protestants did, as revolutionary elements because of the perception that their allegiance was to a foreign sovereign, the Pope.¹⁰⁷ Because of this fear, there is evidence that Williams suggested that Catholics be "disarmed and required to wear distinctive clothing" to facilitate their ready identification.¹⁰⁸ He similarly thought Quakers' disdain for authority a threat to the state.¹⁰⁹ Nevertheless, for both Catholics and Quakers, Williams advocated liberty of conscience, notwithstanding his worries, as, indeed, he did for all. He called for suppression of their "incivil" behavior, but not their worship.¹¹⁰

A final piece of evidence bearing on the question of the scope of conscience is freedom of thought. Williams limited liberty of conscience to religious conviction, not the broader category of freedom of inquiry. Thus, religious conscience was what he founded as inviolable, not conscience generally.¹¹¹ In fact, Williams believed in suppression of speech to the extent it threatened the social or-

on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

Recently, however, in the controversial *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, the Court appears to have rejected faith-based acts when they conflict with a general law. In *Smith*, the Court declined to extend free exercise protection to religiously inspired peyote use because drug use conflicted with general criminal prohibitions.

107. See Morgan, *supra* note 7, at 136-37.

108. *Id.* To place Williams' concerns in perspective, John Locke, by comparison, did not extend religious freedom to Catholics. See Hall, *supra* note 12, at 493 (citing John Locke).

109. See Morgan, *supra* note 7, at 137.

110. *Id.*

111. See *id.* at 136.

der.¹¹² Thus, we can see clearly that Williams was an evangelical, not a son of the Enlightenment. A summary of Roger Williams' views on conscience now seems in order.

2. *Summary on Conscience*

Through Williams' assertion and elaboration of "the cause of conscience" we can see the foundation of our religious freedom. First, conscience forms our path to God. It is, therefore, the essence of religion itself, revealing, as it does, the soul of man and his communication with God. This idea provides a strong justification for treating religion as a special activity meriting preferred treatment in the social order. Second, being rooted in human character and divine communication, conscience is an inviolable aspect of being human. These two foundations form a strong justification for the treatment of conscience as a human right. Third, the essence of conscience is protection against persecution and coercion. Compulsion of conscience is contrary to the law of God and the natural law of man. Fourth, conscience involves matters of belief plus matters of action, although it is difficult to say exactly how far the scope of each extends. We can conclude, however, that religiously motivated conduct is limited by the need for law and order, although the precise line between the two remains elusive. These thoughts are Williams' main contributions to our concept of religious liberty. But they are not his only thoughts on religion, as the next sections attest.

3. *Tolerance*

The idea of tolerance follows from Williams' conception of conscience. Since conscience is inviolable, the proper course, when faced with an act of conscience, is to allow the person his or her choice. All people possess conscience.¹¹³ Therefore, all people are entitled to their views, whether one agrees or disagrees with them. Williams certainly disagreed with the religious views of many in his lifetime. Yet, he extended religious toleration to them. The idea of tolerance extends to "Indians . . . French, Dutch, Spanish, Persians, Turks, [and] Jews . . . [all of whom] should . . . be permit-

112. *See id.*

113. "I speak of conscience, a persuasion fixed in the mind and heart of man, which enforceth him to judge . . . and to do so and so with respect to God, His worship." Letter to Endicot, *supra* note 70, at 159.

ted in their worships if correspondent in civil obedience"¹¹⁴ From this it follows that tolerance is the only proper response to the universal assertion of conscience.

For his time, if not, indeed, our time, Roger Williams framed a remarkably broad, and inclusive, freedom of religion, extending its protections to all believers, Christian and non-Christian. This foreshadowed the tolerance that would be necessary for the emerging pluralism of the New World. This can best be seen against the struggles of the Old World. In the England of his time, a civil war was raging over, among other issues, religion. With the establishment of the Stuart dynasty, signaled by James I accession to the throne in 1603, Protestant England feared the restoration of Catholicism. This flared into outright civil war during the reign of Charles I, ending in his beheading. Protestants distrusted Catholics, fearing them as "dual citizens" with the superior claim being to church and not to state. In continental Europe, the Thirty Years War, which lasted from 1618-1648, ending in the Treaty of Westphalia, was also fought over religion, as Catholics strove to contain the revolution of Protestantism.¹¹⁵

In this contentious climate, Williams wrote his major religious works, calling for liberty of conscience and tolerance.¹¹⁶ In his time, especially notable were his calls for tolerance concerning Catholics and Native Americans, although the same might be said for Jews¹¹⁷ and Turks.¹¹⁸ In *Queries*, Williams called for tolerance on behalf of Catholics amidst the English civil war, and amidst the

114. *Id.* at 139 (quoting from an excerpt of Bloody Tenent). In his *Ship of State Letter*, *supra* note 88, at 225-26, Williams phrased the idea of tolerance as follows: "Papists and Protestants, Jews and Turks . . . [are all entitled to] liberty of conscience."

115. In Münster, the capitol of Westphalia, the Anabaptists, forerunner of the American Baptists, took over the town, a Catholic stronghold, in 1534. See Gausstad, *supra* note 5, at 3. When the Catholics retook the town, they hung the leaders of the Anabaptists from the main church steeple. Thus, the Old World suffered tremendous religious wars.

116. "[W]e query how with comfort to your souls you may encourage the English treasure to be exhausted, and the English blood to be spilt for the cause of Christ?" Miller, *supra* note 19, at 84 (quoting from *Queries*).

117. Rhode Island was the first haven for Jews in America, as for many faiths. This resulted in the founding of the country's first Jewish synagogue, the Tauro Synagogue, in Newport. See Curry, *supra* note 10, at 90-91.

118. The Turks' domination of eastern and central Europe spanned a century, ending at Vienna, in 1530, with the defeat of the Ottoman army. Turks certainly were severely discriminated against in Europe.

doctrinal battle in Protestantism between Presbyterians (Anglicans) and Independents, such as Williams.¹¹⁹ Similarly impressive was his embrace of Native Americans, who were regarded by most English settlers as barbarians. Most settlers warred with Indians. Williams tried to understand them and be their friend. For Williams, all consciences—"a rightly informed conscience, or a blind and erroneous conscience"¹²⁰—are entitled to have their way. Williams was doctrinaire on matters of religion, but tolerant of others' beliefs. He was dogmatic in religion, but civil and tolerant in society.

Viewed from Williams' theological perspective, the world could be divided between true believers (such as Williams) and all others. The church of true believers was voluntary and small.¹²¹ Outside of this church, were all others: English, Spanish, European, non-European, Catholic, Protestant, Turk, and Jew. European civilization was not superior to Native American. All were equal. None were better than others. Equality, respect and toleration were the tools of civil discourse. "*I plead for Impartiality and equal freedom, peace, and safety to other Consciences and Assemblies, unto which the people may as freely goe, and this according to each conscience, what conscience soever this conscience be (not transgressing against Civilities) whether of Jews or Gentile.*"¹²²

Williams' views on toleration find, fittingly, resonance in the work of John Locke, who wrote on this in his famous *A Letter Concerning Toleration* in 1689, some fifty years after Williams.¹²³ Madison too thought deeply about these ideas in the period leading

119. "We query (if security may be taken by the wisdom of the state for civil subjection) why even the Papists themselves and their consciences may not be permitted in the world?" Miller, *supra* note 19, at 84 (quoting from *Queries*). Perry Miller notes that the members of Parliament must have considered *Queries* to be a "weird production, asserting in the disarming form of questions that not only should Presbyterians and Independents refrain from cutting each other's throats, but that even Catholics should be tolerated." *Id.* at 80.

120. *Id.* at 119 (quoting from *Bloody Tenent*). In Williams' view, all men were depraved before God. In such depravity, all were equal; none had a superior claim to God.

121. For Williams, true believers were those who believed in the separatist brand of Calvinism that Williams advocated. This church should govern its own affairs, yet operate within the laws of civil society.

122. Hireling, *supra* note 42, at 164-65.

123. Locke does not attribute his ideas to Williams, nor is there any evidence that Locke was familiar with Williams' work. See Hall, *supra* note 12, at 489 n.173; *infra* notes 189-97 and accompanying text.

up to the framing of the First Amendment.¹²⁴ Today, toleration is a bedrock of American society.¹²⁵

There is one final and quite human lesson to be learned from Williams' rumination on tolerance. No person is so sure (or should be so sure) or himself or of her perception of eternal truth, so as to justify imposing that truth on others. People who are interested in imposing their truth on others are not interested in truth, but the act of subjugation.¹²⁶

B. *Institutional Protection of Religion*

1. *Separation*

Having identified and advocated the essence of religion as exercise of conscience, Roger Williams next sought a way to protect and insulate religion from the pressures and reach of the world. His idea was separation from the world to the extent possible. Primarily, the movement toward separation was a way to protect the purity and integrity of religion from an evil, confusing world. Williams assumed that the "world lies in wickedness . . . like a wilderness or a sea of wild beasts innumerable."¹²⁷ Thus, religion, if it was to remain intact, must be shielded from the corrupting influence of the world. This called for the drawing of clear lines: the church is the garden, the world the wilderness. Williams thus originated the evangelical strand of separation that influenced the framing of the First Amendment religious protections, complementing the more secular theories of separation of Thomas Jefferson and James Madison.¹²⁸

Yet, Williams also hypothesized that separation would serve the interests of the state. The experience of England, and even the short experience of the New World, was that the mixing of religion in civil matters was a source of serious discord.¹²⁹ Removing

124. See *infra* notes 210-16 and accompanying text.

125. As put aptly by Justice Kennedy, "To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

126. See Miller, *supra* note 19, at 256.

127. *Id.* at 124 (quoting from *Bloody Tenent*).

128. See *infra* notes 198-200, 212-19 and accompanying text.

129. For example, in the England of Williams' time, discord over religion was a major factor in the English Civil War. In New England, Williams' dispute with Cotton and other Massachusetts figures led to his banishment.

religion from state control, therefore, would eliminate a cause of friction. Government could function untroubled by religious disputes.¹³⁰ This would allow government to concentrate on accomplishing its core function of promoting the common welfare and preserving the civil peace. In short, separation was part of a two-prong strategy. First, it was a means to maintain the purity of religion. Second, it was a way to facilitate the way of government, securing civil peace.

Roger Williams' most famous expression of separation was his wall of separation statement written in *Cotton's Letter Examined*, and quoted at the beginning of this article:

[W]hen they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wilderness of the world, God hath ever broke down the wall itself, removed the Candlestick, and made his Garden a Wilderness, as at this day. And that ther[e]fore if he will ever please to restore his Garden and Paradise again, it must of necessity be walled in peculiarly unto himself from the world, and that all that shall be saved out of the world are to be transplanted out of the Wilderness of [the] world, and added unto his Church or Garden.¹³¹

In this famous metaphor, separation from the world is designed to preserve the purity of religion. Religion is for believers, who voluntarily practice acts of conscience as they communicate with God. To be true to God is to be true to conscience, for in conscience every man and woman finds revealed the eternal truth which illuminates the path to heaven. Thus, fidelity to conscience is a matter of obligation to religious conviction.

Yet, the way of God is not the way of the world. God is pure, the "garden;" "[t]he world lies in wickedness,"¹³² but is also tempting. Moreover, "God's people may lawfully converse and cohabit in cities, towns, [and], else must they not live in the world but go out of it."¹³³ Therefore, the best course is to guard religion from the world, its attractions and dangers, by "it must of necessity be walled in peculiarly unto himself from the world . . ."¹³⁴ At bot-

130. See Hall, *supra* note 12, at 482.

131. Cotton's *Letter Examined*, *supra* note 1, at 392.

132. Miller, *supra* note 19, at 124 (quoting from Bloody Tenent).

133. *Id.*

134. Cotton's *Letter Examined*, *supra* note 1, at 392.

tom, Williams conceives the wall as an institutional strategy to protect religion from the corrupting influence of the world.

Williams' separationist strategy calls for supreme vigilance in order to maintain what is a relatively absolute position on "separate(ness) from the world."¹³⁵ There must be "a separation of holy from unholy, penitent from impenitent, godly from ungodly" ¹³⁶ Separation is the only way to build a church true to God. "[T]o frame any other building upon such grounds and foundations is no other than to raise the form of a square house upon the keel of a ship, which will never prove a soul-saving true ark or church of Christ Jesus according to the pattern."¹³⁷

Stated differently, since the world is the wilderness, to enter the world is to enter the dangerous wild. A believer must, therefore, be on guard, and learn to keep a distance from the world. "If the weeds be kept out of the garden of the church, the roses and lilies therein will flourish, notwithstanding that weeds abound in the field of the civil state."¹³⁸ Maintaining the faith, moreover, calls for vigilance. "[N]ot attending to the command of Christ Jesus to permit the tares to grow in the field of the world, they made the garden of the church and field of the world to be all one" ¹³⁹

No person or church is so distinct, or sure of truth, that they can remain immune from the lures of the world.¹⁴⁰ No church can mix with the world without exposing itself to the danger of its own inner decay. "[B]y degrees the garden of the churches of saints were turned into the wilderness of whole nations."¹⁴¹ This happened during the time of Constantine when "the whole world became Christian or Christendom" as rulers sought to make "the garden of the church and field of the world to be all one."¹⁴² Such was "zealous mistake[s] persecut[ing] good wheat instead of

135. *Id.*

136. *Id.* at 393.

137. Miller, *supra* note 19, at 98-99 (quoting from Cotton's Letter Examined).

138. *Id.* at 137 (quoting from Bloody Tenent).

139. *Id.* Williams expresses this same thought in different ways. "When Christianity began to be choked, it was not when Christians lodged in cold prisons, but down-beds of ease." *Id.*

140. *See id.*

141. *Id.*

142. *Id.*

tares.”¹⁴³ This also happened in Massachusetts Bay with the attempt to enforce religious orthodoxy. Any such mixing of church and state undermines the purity of religion, in Williams’ view, thus obstructing the path to salvation.

Williams’ thought has implications both for religion and government. For religion, separation is the means by which religion may be nourished and maintained as pure. Religion, at bottom, is a matter for the religious, who are best qualified to determine the course of a church. Religion is devalued to the extent people or forces other than the religious determine its course.

The implications for government follow from this definition of religion. Since religion is for the believers, there is really no role for government to play other than, perhaps, to encourage believers to follow their conscience. Otherwise, the role of government is to leave religion alone. Instead, government should concentrate on performing its core function of preserving the civil peace, not the spiritual. These thoughts on separation led Williams to think deeply about the role of government, the role of religion, and their coexistence, which he developed into a theory of different jurisdictions for each.

2. *The Different Jurisdictions of State and Religion*

Having made the case that cause of conscience was the essence of religion, and that for religion to remain pure it must be separate from the world, Roger Williams now turned his attention to elaborating a theory by which religion and government could coexist. Williams thought deeply about both religion and government. His thoughts on government were grounded in social contract theory, believing that sovereignty lay with the people, and not any “divine right of kings,” and that any people, including Native Americans, could choose the government they desire.¹⁴⁴

143. *Id.*

144. I infer that the sovereign, original, and foundation of civil power lies in the people And if so, that a people may erect and establish what form of government seems to them most meet for their civil condition. It is evident that such governments as are by them erected and established have no more power, nor for no longer time, than the civil power or people consenting and agreeing shall betrust them with.

Id. at 147. Social contract theory, of course, followed from Enlightenment thought, and was influential at this time in England. Later, in 1690, John Locke would write his famous *Two Treatises of Government*. Interestingly, Williams’ formation

Williams' approach was to identify the essential attributes of each government and religion as a way of distinguishing one from the other. By so distinguishing the two, they could remain separate from one another. Thus, the affairs or disputes of one would not effect the other. The main role of government, in Williams' view, was to preserve law and order, and promote social peace. The main role of religion was to facilitate communication with God so that one could find a path to salvation. For Williams, these goals were not incompatible. For example, since government maintained law and order, and civil peace, it created the conditions in which religion could thrive. Similarly, since religion promoted good morals, it encouraged people to be good citizens.

This theme is stated throughout Williams' writings, but is best expressed in *Bloody Tenent*:

There is a civil sword, called the sword of civil justice, which, being of a material civil nature, for the defense of persons, estates families, liberties of a city or civil state, and the suppressing of uncivil or injurious persons or actions by such civil punishments—it cannot, according to its utmost reach and capacity . . . , I say, cannot extend to spiritual and soul causes, spiritual and soul punishment, which belongs to that spiritual sword with two edges, the soul-piercing (in soul-saving or soul-killing), the Word of God.¹⁴⁵

So stated, the proper role of government is to maintain civil peace, defend life, liberty, and property, and keep law and order, including "execut[ing] vengeance against robbers, murderers, tyrants,"¹⁴⁶ and other violators of the social order. Over such civil matters, government is entitled to use civil measures, including

of the colony of Rhode Island, in 1647, literally constituted a social contract between the original founders and newcomers. Williams' ideas on democracy certainly predated Locke's work on social contract theory. See *supra* notes 28-30 and accompanying text.

145. Miller, *supra* note 19, at 133 (quoting from *Bloody Tenent*); see also *id.* at 198 (discussing the proper role of government).

The civil sword (therefore) cannot rightfully act either in restraining the souls of the people from worship or in constraining them to worship, considering that there is not a title in the New Testament of Christ Jesus that commits the forming or reforming of His spouse and church to the civil and worldly power

Id. (quoting from *Hireling*).

146. *Id.* at 84 (quoting from *Queries*).

"those weapons which are used by persecutors—stocks, whips, prisons, swords, gibbets, stakes" ¹⁴⁷

Having defined what government can, and appropriately should do, Williams next turns to what government cannot do. Official power does not extend to "spiritual and soul causes," ¹⁴⁸ affairs that belong to religion, not government. "[A]gainst these spiritual strongholds in the souls of men, spiritual artillery and weapons are proper" ¹⁴⁹ Thus, the "spiritual sword" rules spiritual matters, not the "civil sword." ¹⁵⁰ Over spiritual matters, "civil weapons are improper" ¹⁵¹ Stated differently, civil jurisdiction extends over matters involving "external peace," religious jurisdiction covers affairs of "internal peace." ¹⁵²

Williams' division of function between religion and government reflects an innovation in thought about the proper role of government. In denying that government had a role to play in controlling religion, Williams was really calling for a new role for government. He was challenging the main western thought of his day that government, because it was divinely ordained, had the power to carry out the divine. ¹⁵³ In challenging this assumption, Williams was not contesting the value of government. He believed in government, and thought it had an important role to play, especially in securing peace. However, he did not think that role was divinely instituted, nor that it included authority over religion. ¹⁵⁴ In denying governmental authority over religion, Williams advocated a cause not followed in western thought for a century or more, when Americans took up this cause in their framing of reli-

147. *Id.* at 131 (quoting from Bloody Tenent).

148. *Id.* at 133.

149. *Id.* at 131.

150. *Id.* at 133.

151. *Id.* at 132.

152. "[T]he powers of the world or civil state are bound to propose external peace in all godliness for their end, and the end of the church be to preserve internal peace in all godliness" *Id.* at 145-46.

153. The most obvious manifestation of this thought was the theory of the divine right of kings and queens, by which the sovereign asserted authority over spiritual as well as temporal matters. Coercion over the spiritual realm was part of the sovereign's prerogative. See Morgan, *supra* note 7, at 64.

154. This follows from Williams' view that there were no chosen people or governments after the ancient Israelites; therefore, there could be no national churches.

gious protections.¹⁵⁵ Today, we take government's disability to act on religion for granted. But, for Williams' time, this was a radical thought.

This division of function benefitted both religion and government. The benefits to religion are clear, as enumerated in Williams' argument for separation.¹⁵⁶ But there are significant benefits for government as well. By removing religion from government's jurisdiction, Williams excised a significant cause of discord in the body politic. Williams' innovation was revolutionary: civil peace is best secured by eliminating official control of religion. This removed persecution for cause of conscience and the inevitable ill-will it bred. Furthermore, this focused attention away from what government should do and toward the goal of what government can do. This was a liberating innovation, because it relieved government of the pressure to act divine.¹⁵⁷ Instead, government could address its core function of promoting the general welfare and securing common peace.

In this manner, we can see how Williams' strategy was to insulate one jurisdiction from the effects of discord or friction that might arise in the other. Religion and government were separate, not intertwined. Each had its own identity, purposes, and history. This was the way toward peaceful coexistence.

Williams' division of function between religion and government calls for precise identification of the essential attributes of each. For Williams, the essence of religion is conscience. Thus, conscience is the absolute barrier into which government may not intrude, which he advocated throughout his life as persecution for cause of conscience.¹⁵⁸ Instead, a state should promote freedom of conscience.¹⁵⁹ Tolerance of conscience safeguards religious free-

155. See Morgan, *supra* note 7, at 89-90. Some early Separatists had edged toward freeing religion from state control, but Williams took the decisive steps. See *id.*

156. See *supra* notes 140-41 and accompanying text.

157. See Morgan, *supra* note 7, at 120. In the past, social peace was forced by imposing a uniform faith on all.

158. See *supra* notes 60-68 and accompanying text.

159. "I affirm that state policy and state necessity which (for the peace of the state and preventing of rivers of civil blood) permits the consciences of men will be found to agree most punctually with the rules of the best politician that ever the world saw . . ." Miller, *supra* note 19, at 135 (quoting from Bloody Tenent).

dom, and removes discord from the commonwealth, thereby preventing the spilling of "civil blood."¹⁶⁰

Likewise, there are limits to religion if it too is to exist peacefully with government. The essence of civil society is the maintenance of law and order. Williams was a strong proponent of law and order, having experience with it firsthand in his founding and administering of Rhode Island. In Williams' view, religious practices had no license to disturb civil peace. If a person or church disturbed civil peace, civil authorities could punish such conduct.¹⁶¹ Law and order thus constituted the limit of religious freedom.¹⁶²

Thus, Williams' strategy on the roles of religion and government comes into clear view. First, Williams sought to identify the essential attributes of each. The essence of religion was conscience; that of government law and order. Neither religion nor government should intrude into the affairs of the other. A policy of peaceful coexistence was thereby encouraged, one where religion could flourish and civil peace maintained. This strategy found general resonance in the thinking of James Madison.¹⁶³ His strategy carried with it several important cognates, especially that of discouraging national churches or establishments of religion, and the view that churches should function in society like any other association.¹⁶⁴

3. *No National Church*

Under Williams' separationist theory, the worst offense was a mixing of church and state. Then, the garden of the church would turn into the wilderness of the world, and "civil blood" would spill. There could be no worse mixture than the establishment of a national church. Williams campaigned against an officially sponsored or national church his whole life. Certainly this bore the imprint of his own bitter experience. In Williams' view, his exile

160. *Id.*; see also *id.* at 143 (arguing civil peace is destroyed when a state persecutes conscience).

161. See *Bloody Tenent*, *supra* note 34, at 229, 232; see also Hall, *supra* note 12, at 483 (citing same).

162. A diversity of religion should "be permitted in their worships if correspondent in civil obedience" Miller, *supra* note 19, at 139 (quoting from *Bloody Tenent*); accord *Ship of State Letter*, *supra* note 88.

163. See *infra* notes 200, 209 and accompanying text.

164. See *infra* notes 165-76 and accompanying text.

was due to Massachusetts' union of church and state.¹⁶⁵ Thus, Williams' associated national churches with persecution for cause of conscience. Under such a national church, there was only one path to God, the one approved by authorities. If one did not subscribe to this orthodoxy, one was a "heretic," persecuted for cause of conscience. This was Williams' own experience.

Such was also the experience of England, and Europe generally. England changed religion with monarchs.

Who knows not in how few years the commonweal[th] of England hath set up and pulled down? The fathers made the children heretics, and the children the fathers. How doth the Parliament in Henry VIII his days condemn the absolute Popery in Henry VII? How is in Edward VI his time the Parliament of Henry VIII condemned for their half-Popery, half-Protestantism? How soon doth Queen Mary's Parliament condemn Edward for his absolute Protestantism? And Elizabeth's Parliament as soon condemn Queen Mary's for their absolute Popery . . . ? And oh! since the commonweal[th] cannot without a spiritual rape force the consciences of all to one worship, oh, that it may never commit that rape in forcing the consciences of all men to one worship which a stronger arm and sword may soon (as formerly) arise to alter.¹⁶⁶

For Williams, this was "the sword . . . mak[ing] a whole nation of hypocrites."¹⁶⁷ Since, in Williams' view, establishment churches rule by the sword, the relationship is one of power, not faith.

165. In commenting on his own banishment, Williams observed:

Secondly, if he mean this civil act of banishing, why should he call a civil sentence from the civil state, within a few weeks' execution in so sharp a time of New England's cold, why should he call this a banishment from the churches except he silently confess that the frame or constitution of their churches is implicitly national (which yet they profess against)?

Miller, *supra* note 19, at 94 (quoting from Cotton's Letter Examined).

166. *Id.* at 82-83 (quoting from Queries). For Williams, this was "after the ancient pattern of Nebuchadnezzar's bowing the whole world in one most solemn uniformity of worship to his golden image." *Id.* at 131 (quoting from Bloody Tenent).

167. *Id.* at 130 (quoting from Bloody Tenent). Williams goes on to elaborate this point:

What a most woeful proof hereof have the nations of the earth given in all ages? And to seek no further than our native soil, within a few score of years how many wonderful changes in religion hath the whole kingdom made, according to the change of the governors thereof, in the several religions which they themselves embraced! Henry VII finds and leaves the kingdom absolutely Popish. Henry VIII casts it into a mold half-Popish, half-Protestant. Edward VI brings forth an edition all Protestant. Queen

The most important consequence of Williams' belief in the implausibility of national churches was the important argument against establishment of religion, which has become central to American thought. In arguing against a national church, Williams delineated the essence of the argument against establishments. The attributes of an establishment can thereby be identified.

The clearest example is where only one religion and one worship is commanded and permitted.¹⁶⁸ An example of this was the New England Congregational Church, which resembled the English Church. The essential attribute is where a "people of [a] . . . nation have been forced into a national way of worship" ¹⁶⁹ Coercion of conscience over matters of faith and worship to officially accepted practices constitutes establishment of religion.

Perhaps the clearest definition of an establishment lies in *Yet More Bloody*, where Williams draws from his own experience with the established church of Massachusetts Bay. Through this example, Williams saw five essential characteristics of an establishment. First, government mandated that people go to "*common worship*" and "*holy times*," required contributions to "*holy Officers*," and outlawed dissenting faiths.¹⁷⁰ Second, civil power supervised "*the conforming or reforming of the Church, the truth or falsehood of the Churches, Ministries or ministrations, ordinances, Doctrine . . .*" ¹⁷¹ Third, magistrates punished the "*Heretick, Blasphemer, [and] Seducer*," generally by death or exile.¹⁷² Fourth, government enforced public "*maintenance of the Worship, Priests and Officers*."¹⁷³ Finally, like national churches, representatives of the Congregational church assembled in synods and councils.¹⁷⁴

Mary within a few years defaceth Edward's work and renders the kingdom (after her grandfather Henry VII his pattern) all Popish. Mary's short life and religion end together; and Elizabeth reviveth her brother Edward's model, all Protestant.

Id.

168. See *Yet More Bloody*, *supra* note 41, at 389.

169. Miller, *supra* note 19, at 204 (quoting from *Hireling*).

170. *Yet More Bloody*, *supra* note 41, at 390; accord Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1619-20 (1989).

171. *Yet More Bloody*, *supra* note 41, at 390.

172. *Id.*

173. *Id.* at 391.

174. See *id.*

Although a basic definition of an establishment, Williams' idea is a clear analogue to the American idea that would later develop.

4. *Church as Association in Society*

As a final elaboration of the different jurisdictions of religion and government, Williams posited that a church, which was a voluntary organization of believers, was like any "corporation, society, or company"¹⁷⁵ in civil society. As such, a church could retain their records, hold disputations, and, generally, be free to run its own affairs, like any other association in society. A church could even "dissent, divide, break into schisms and factions, sue and implead each other at law"—even "wholly break up and dissolve into pieces and nothing."¹⁷⁶ The church, in short, should be wholly autonomous in running its affairs.

Of course, the limit of church autonomy, like any association, is the law and order of society, as explained above.¹⁷⁷ Short of breaking the civil peace, none of the activities of the church will cause "the peace of the city . . . [to] be in the least measure impaired or disturbed."¹⁷⁸ This is "[b]ecause the essence or being of the city, and so the well-being and peace thereof, is essentially distinct from those [religious or other] particular societies; the city courts, city laws, city punishments distinct from theirs."¹⁷⁹

C. *Summary*

As we take stock of Williams' contributions to early American religious thought, we see the significance of his work. Through his seminal argument for cause of conscience, he elaborated the essential argument for inviolability of conscience in matters of religion, which has become the foundation for religion as a preferred freedom. By extending this privilege to all, he set the basis for religious faith on tolerance and respect. This helped assure that religion would not be a source of significant discord in society and offered a key mechanism for the functioning of a pluralistic society. These arguments for conscience and tolerance formed the foundation of individual religious freedom in America.

175. Miller, *supra* note 19, at 117 (quoting from Bloody Tenent).

176. *Id.*

177. See *supra* notes 161-62 and accompanying text.

178. Miller, *supra* note 19, at 117 (quoting from Bloody Tenent).

179. *Id.*

With his rooting of religious freedom in conscience, and his elaboration of the value of religion, Williams might be thought of as the intellectual father—or grandfather—of the Free Exercise Clause. Free exercise of religion is grounded in the pre-Enlightenment view that fidelity to conscience is a matter of duty to God.¹⁸⁰ A person should have the “right” to respond to divine command. The value of conscience, thus, is that it frees a person from the necessity of having to choose between secular and sectarian sovereigns.¹⁸¹ Instead, conscience can act as the haven for a person’s beliefs. These ideas underscore the specialness of religion, which the Free Exercise attempts to capture as a preferred value or “right.”

Institutionally, Williams also laid the basis for protecting religion from government, and government from religion. His main strategy was separation—the first time this theory was advocated and applied on this side of the Atlantic. Complementing separation was the division of religion and government into different jurisdictions, which would allow each to perform its core functions optimally. Within this construct, a mixing of church and state was identified as the core evil, resulting in the spilling of “civil blood.” From this, Williams set forth an essential criteria for identifying establishments of religion, which constituted a serious threat to religious freedom. Through these arguments, Williams made the essential argument for nonestablishment of religion, picked up by the Supreme Court in the last half of the twentieth century.

In sum, Roger Williams, writing in the middle 1600s, laid the foundation for religious freedom in America, both from an individual and institutional perspective. Let us now trace, more carefully, his influence on the framing of the First Amendment religious protections.

III. ROGER WILLIAMS’ FORGOTTEN INFLUENCE ON THE FIRST AMENDMENT

Despite Roger Williams’ notable contributions to the development of religious liberty in the period before the First Amendment, he appears, ironically, to have little direct influence on the framing

180. See Hall, *supra* note 12, at 513.

181. See *id.* at 514.

of religious freedoms in the First Amendment.¹⁸² In fact, by the time of the ratification of the First Amendment, in 1791, he was somewhat of a forgotten man. Instead, John Locke, Thomas Jefferson, and James Madison were the main intellectual influences on First Amendment religious freedoms, and they proceeded without apparent direct influence from Williams.¹⁸³

Locke, Jefferson, and Madison were people of the Enlightenment, reflecting its rationalist views, and articulating its rationalist rhetoric, including the language of "natural rights."¹⁸⁴ On church-state relations, they posited that each should be separate from the other, as much to protect the body politic as religion. Jefferson, in particular, was intent on realizing a new, civic republican, theory of government. He was most concerned about protecting the body politic from religion so that the new theory might have a chance to survive.¹⁸⁵ Jefferson's wall of separation, therefore, was designed more to protect the state from religion than the other way. In these ways, we might think of Jefferson as the intellectual father of the Establishment Clause.

This Enlightenment view seems to have been the dominant one animating the First Amendment. Williams' thought, by contrast, reflected the evangelical separatist school of thought. Williams spoke the language of religion, in contrast to the Enlightenment discourse of the Framers. On church and state, Williams advocated separation to protect the "Garden" from the "Wilderness."¹⁸⁶ Certainly he was the preeminent voice of this

182. See *id.* at 458.

183. See *id.* at 489.

184. Through such terminology, God-given rights were transformed into "inalienable" civil rights. Locke, *supra* note 55, at 172-73. As "inalienable," rights—whether God-given or naturally existing—could never be surrendered to any civil authority. In this way, Locke translated the essentially religious rhetoric of the Puritan Independents, including Williams, into the new language of "natural rights." This more rationalist discourse, grounded in the Enlightenment, paved the way for the reception of social contract theory and natural rights by the American Framers. While Locke's ideas were not terribly original, his articulation of them in a new voice was a great accomplishment.

185. Jefferson, and other Enlightenment thinkers of the American Revolution, feared the passion and irrationality that religion sometimes brought out in people. See Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 426-29 (1969); Gordon S. Wood, *The Radicalism of the American Revolution* 368-69 (1991). They viewed this as a threat to the rational discourse required for dispassionate debate about public affairs.

186. Cotton's Letter Examined, *supra* note 1, at 392.

view, although Williams, too, asserted that separation was in the interest of the state.¹⁸⁷ Williams' view influenced Isaac Backus, a Baptist minister, and other religious and political figures of the Constitutional period who contributed to the formation of First Amendment freedoms. In this way evangelical separatism, originated in America by Williams, complemented Enlightenment ideals, providing a twin support for the idea of separation of church and state. Thus, the First Amendment reflects these two main traditions, Enlightenment rationalism and evangelical separatism, although the Enlightenment was the dominant tradition within which the specific freedoms were framed, and also the one within which the freedoms are now mainly understood.¹⁸⁸ How Roger Williams became the forgotten man of religious freedom—eclipsed by the Enlightenment—is the subject of this Part III.

Roger Williams was the most systematic American thinker on religious freedom in the period before the First Amendment, as Part II evidences.¹⁸⁹ In fact, Williams was a deeper thinker on religious freedom than either Thomas Jefferson¹⁹⁰ or James Madison.¹⁹¹ Yet, there is no direct evidence that Williams influenced overtly Locke, Jefferson, or Madison.

187. See *supra* notes 127-43 and accompanying text.

188. See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 214 (1963) ("[T]he views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.") (footnote omitted); see also *id.* at 260 (Brennan, J., concurring) ("[O]ur tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams.") (quoting Paul A. Freund, *The Supreme Court of the United States* 84 (1961)).

189. See generally Curry, *supra* note 10, at 93 (noting that no one in the 18th century wrote as deeply on religious freedom as Williams and William Penn). In fact, not until the late 18th century, when John Leland emerged, was there a prominent, systematic thinker in America on religious freedoms that compared to Williams. See *id.* at 182.

190. Jefferson is known mainly for his famous *Danbury Church Letter*, *supra* note 3, where he posited his famous "wall of separation" metaphor. The document is, after all, a letter, written a decade after the adoption of the First Amendment. Jefferson is also famous for his authoring of the *Virginia Bill for Establishing Religious Freedom*, drafted in 1779, which is less than one thousand words. See Hall, *supra* note 12, at 496 (citing Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), reprinted in 5 *The Founders' Constitution* 77 (Philip B. Kurland & Ralph Lerner eds., 1987)).

191. Madison is most famous for his *Memorial*, which is about 10 pages as cited in *Everson v. Board of Educ.*, 330 U.S. 1 app. at 63-72 (1947). *Memorial* was written as a petition to oppose a Virginia proposal to establish support for Christian schools. It served to rally opposition to the measure, leading to its defeat.

Locke's apparent oversight of Williams seems most surprising, since his *A Letter Concerning Toleration* is only about fifty years removed from Williams' work, which, as we know, had influence in England, including among prominent thinkers like Cromwell, Henry Vane, John Owen, and John Milton.¹⁹² His fame was easily greater in England than the colonies. It would thus seem probable that Williams had some influence on the development of English religious freedoms.¹⁹³ Given Williams' fame in English inner circles, he would, presumably, have been a logical person to draw upon for ideas.¹⁹⁴ Moreover, Locke's *A Letter Concerning Toleration* resonates with the ideas of Williams.¹⁹⁵

Madison also played an important role in assisting George Mason to write the *Virginia Bill for Establishing Religious Freedom*. See Hall, *supra* note 12, at 507-08.

192. See *supra* notes 32-33 and accompanying text. For discussion of Williams' influence in America, see authorities collected in Adams & Emmerich, *supra* note 170, at 1564 n.17.

193. Professor Curry notes that ideas about toleration spread to America from England from books, including Williams'. See Curry, *supra* note 10, at 18. It is beyond the scope of this article to trace definitively the influence of Williams' thought on England.

194. Historians debate the influence of Williams on Locke. Some have suggested that Locke merely restated Williams' ideas. See, e.g., Winthrop S. Hudson, *John Locke: Heir of Puritan Political Theorists*, in *Calvinism and the Political Order* 108 (George L. Hunt ed., 1965):

The parallels with the thought of Roger Williams . . . are so close that it is not an entirely implausible conjecture to suggest that Locke's major contribution may have been to reduce the rambling, lengthy, and incoherent exposition of the New England 'firebrand' to orderly, abbreviated, and coherent form It is impossible to discover a single significant difference between the argument set forth by Williams and that later advanced by Locke. They scarcely differ even in the details of its practical application.

Id. at 117-18; see also David Little, *Roger Williams and the Separation of Church and State*, in *Religion and the State: Essays in Honor of Leo Pfeffer* 7 (James E. Wood, Jr. ed., 1985) ("[T]he similarities between the thought of Williams and Locke on religious liberty are so evident that, quite possibly, Locke did little more than translate Williams's often tedious and rambling arguments into succinct and lucid prose."). Certainly Locke drew upon the arguments of English Puritan Independents, like John Milton and John Owen, who exchanged ideas with Williams. See *id.* However, there does not seem to be any direct evidence of Locke's reliance on Williams. See Hall, *supra* note 12, at 489 n.173.

195. For example, like Williams, Locke set out an institutional arrangement of separation by jurisdiction so that the state would not interfere with religion; argued that forced worship induced hypocrisy and not true belief; and hypothesized that freedom of conscience was necessary to preserve civil peace. See Locke, *supra*

Locke's *A Letter Concerning Toleration* is important, in particular, because it was the primary influence on the English Act of Toleration, of 1689, which guaranteed certain religious freedom in England.¹⁹⁶ Because the American colonies remained subject to English law, the Toleration Act applied in the New World, too. The Toleration Act had the greatest impact on the loosening of religious orthodoxy in the colonies, leading to a more tolerant climate along the lines envisioned by Williams.¹⁹⁷ Seen in this light, Williams was at least sixty—maybe 100—years ahead of his time, and achieved, perhaps, influence indirectly on Locke and American ideas.

John Locke is also important because he was the primary influence on Jefferson and Madison, the two main influences on the formulation of First Amendment guarantees. Through the efforts of Jefferson and Madison on behalf of religious freedom in Virginia, that colony, and not Rhode Island, became the model for American freedom.¹⁹⁸ There are also key similarities in the religious thought of Jefferson¹⁹⁹ and Madison,²⁰⁰ as measured against Williams' work, which suggests, again, the resonance of Williams' ideas.

note 55, at 172-75, 183, 219. For a detailed comparison of the similarities between the work of Williams and Locke, see Hall, *supra* note 12, at 490-95.

196. See Curry, *supra* note 10, at 79. The Act actually only allowed dissenters to exist within society. They yet remained second-class citizens. See *id.* at 54.

197. See Hall, *supra* note 12, at 489. Some colonies, such as Rhode Island, Pennsylvania and New Jersey, had religious guarantees in place that were more tolerant than those provided in the Act of Toleration. See Curry, *supra* note 10, at 79-80.

198. For example, the Court in *Everson v. Board of Educ.*, 330 U.S. 1, 11-13 (1947), relied heavily on this Virginia experience. See also *McGowan v. Maryland*, 366 U.S. 420, 437-40 (1961) (noting the significance of the Virginia experience to development of religious freedom).

199. For example, like Williams, Jefferson asserted that coercion of conscience is inconsistent with true belief; official support of religion leads to its corruption; and that opinion, including religious opinion, is not within the jurisdiction of government, echoing Williams' original argument of protection for religion based on different jurisdictions. Compare Jefferson, *A Bill for Establishing Religious Freedom*, *supra* note 190, at 77 (noting Jefferson's argument that religious opinions are not within the civil government's jurisdiction) with Miller, *supra* note 19, at 131-33 (quoting Williams' argument that "civil weapons are improper" in religious matters); see also Hall, *supra* note 12, at 495-505 (providing a detailed comparison of Jefferson's thought in relation to Williams').

200. For example, like Williams, Madison believed that conscience is a gift of God and, therefore, cannot be surrendered to the social order; religious belief and opinion cannot be coerced; religion is inalienable and, therefore, beyond the control of government; and that assessments and establishments violate the principle of

After his death, in 1683, however, Williams' views were no longer discussed in America. Rhode Island, Williams' "lively experiment," became a despised outcast, and would not play a role in the development of American religious concepts for the next 100 years,²⁰¹ despite the colony being the first founded on religious freedom. "[N]o library catalogue published in the American colonies listed any of his works."²⁰² Thus, Williams was a forgotten man until rediscovered by Isaac Backus, the Baptist minister and thinker, in 1773.²⁰³

Why Williams and Rhode Island became forgotten is an interesting question. Williams was not highly regarded by his American contemporaries.²⁰⁴ Given his low standing, it is perhaps not so

equality open to believers. *Compare Memorial*, cited in *Everson v. Board of Educ.*, 330 U.S. 1 app. at 64 (1947) (discussing how an individual's duty to God supercedes the duty owed to society; how an individual must follow his or her mind and not the "dictates of other men;" the inalienability of religion; and the negative effects of assessments and establishments) with *Letter to Endicot*, *supra* note 70, at 225-26 (discussing the need for individuals to be true to conscience) and *Miller*, *supra* note 19, at 143 (quoting Williams' argument from *Bloody Tenent* that individuals should be free to make their own religious choices) and *id.* at 130, 133, 147 (quoting Williams' arguments from *Bloody Tenent*). For a detailed comparison of Williams' thoughts to Madison's, see *Hall*, *supra* note 12, at 505-13.

201. See *Hall*, *supra* note 12, at 488. "[A]lmost no one in colonial New England ever praised his experiment, sought his advice, quoted his books, or tried to imitate his practices." *Id.* at 488-89 (quoting 1 William G. McLoughlin, *New England Dissent 1630-1833*, at 8 (1971)).

202. Curry, *supra* note 10, at 91. "[N]ot even his anti-Quaker treatise, *George Fox . . .*" was listed. *Id.* This is quite surprising since *George Fox*, published in Boston, was the only work Williams published in America.

203. Backus was a comprehensive thinker on religious freedom too, elaborating some of Williams' basic ideas on separatism and jurisdictional division between church and state. Williams was Backus' hero, and he made Williams the focus of his work. Yet, even Backus was careful to draw upon John Locke for arguments about religious liberty, couching them in the natural rights rhetoric of the time. He preferred to refer to Williams as a noble figure from history. See LeRoy Moore, *Religious Liberty: Roger Williams and the Revolutionary Era*, 34 *Church Hist.* 57, 70 (1965).

Backus also worked to disestablish the Congregational church in Massachusetts, was a political activist, and drafter of a Massachusetts bill of rights. He became a supporter of the Constitution, especially its Article VI prohibition on religious test oaths, despite his Antifederalist sympathies. See Adams & Emmerich, *supra* note 170, at 1592-93 (citing 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 148-49 (Jonathan Elliot ed., 2d ed. 1836) (Feb. 4, 1788)) [hereinafter *Elliot Debates*].

204. An historian concluded "he can scarcely be said to have been prominent in the view even of his own little public." Guild, *supra* note 5, at 48. His name was "handed down to us by Puritan writers loaded with reproach." *Id.* at 47. Cotton

surprising that he was ignored. Further, by the time of the Constitution's framing, Americans no longer spoke about their world in primarily religious terms. Thus, Williams' theocentric rhetoric seemed foreign to the rationalist milieu of the time.

Similarly, Rhode Island was viewed by neighboring colonies as unsavory, with a reputation for "religious radicalism and libertinism."²⁰⁵ Given the widespread religious orthodoxy of the colonies of this time, Rhode Island's experiment in liberty of conscience was too far advanced, during this period, to serve as a model for the development of religious freedom.²⁰⁶ Like Williams, Rhode Island, too, became an unpleasant memory, best forgotten. So forgotten, in fact, that when the name of Rhode Island did come up in discussion, people displayed an ignorance of its religious arrangements.²⁰⁷

Backus and others in the evangelical separatist movement re-introduced Williams' ideas to the debate about religious freedom.²⁰⁸ This group included the Baptists, who became key allies of James Madison, in Virginia and the country as a whole, as Madison sought to build support for the national Constitution.

viewed him as part of the lunatic fringe, possessing an overheated brain. See Curry, *supra* note 10, at 15-17.

205. Curry, *supra* note 10, at 91. "The reputation for 'profaneness and atheism' in the 'Eastern Parts of the neighboring Province,' . . . still clung to it." *Id.* (citation omitted). Cotton Mather once famously observed that Rhode Island had everyone but Catholics and real Christians. See *id.* at 51.

Yet, in spite of "such social opprobrium, Rhode Island continued on its chosen way, neither bending under external pressure nor overreacting to it." *Id.* at 20-21. Still, its reputation for radicalness stuck to it. When the colony issued paper money as currency, its stigma of irresponsibility was reinforced. See *id.* at 21.

206. See *id.*

207. Professor Curry catalogues a number of incidents where people of the 18th century assumed that Rhode Island had established churches, when this was not the case. For example, "New York Presbyterian William Smith, an ardent opponent of the New York Anglican establishment" had assumed "that Rhode Island had an establishment of religion similar to that of the rest of New England, even though the colony had established no church and had decreed that all ministers be supported by voluntary contributions." *Id.* at 91.

208. Other champions of evangelical separatism included John Witherspoon, "the only member of the clergy to sign the Declaration of Independence." Adams & Emmerich, *supra* note 170, at 1593. Witherspoon was president of the college of New Jersey, which later became Princeton University, and served as John Madison's mentor in law and ethics. See *id.* Roger Sherman was also an important advocate of this pietistic tradition. He, of course, signed the Declaration of Independence, Articles of Confederation, and Constitution, and served on the committee that drafted the First Amendment. See *id.* at 1594.

Key points of agreement between Madison and the Baptists included ideals of nondiscrimination on account of religious belief or worship; no national religion; and full and equal rights of conscience for all²⁰⁹—ideas all originating with Roger Williams. People during the time of the framing also inherited from Williams the thought that mixing government with church inevitably led to a corruption of religion, and that coercion destroys true piety.²¹⁰ Thus, adherents of Williams had some influence in the fixing of religious guarantees. Through these discreet tracks, Williams spoke to the generation that framed the Constitution.

In sum, as we compare the originality of Williams' work to those most responsible for the framing of First Amendment religious guarantees, the imprint of Williams on the First Amendment becomes apparent. First, Williams' thought had an important influence on English thought at the crucial time when religious protections were being fixed. This influence, presumably, had some impact on John Locke. Second, there is general resonance of Williams' thought in the work of Locke, Jefferson, and Madison—the main intellectual influences on the First Amendment. Third, Williams' more specific arguments arose, again, through the efforts of evangelicals, most notably Baptists, like Isaac Backus, who contributed to the adoption of the Constitution.²¹¹

Thus, the essence of Williams' thought underlies our First Amendment, even if by unacknowledged or unseen ways. This core includes the inalienability of conscience in matters of faith; condemnation of coercion of conscience; and nonestablishment of religion. These are the polestars of our religious freedom. These ideas continue to resonate today in the jurisprudence of the Supreme Court, which Part IV now examines.

IV. ROGER WILLIAMS IN MODERN SUPREME COURT JURISPRUDENCE

Comparing Roger Williams' thought to that articulated in modern Supreme Court jurisprudence, it is striking how much the

209. See *id.* at 1580.

210. See *id.* at 1562.

211. Backus, for example, believed the First Amendment to be the best guarantee of religious liberty. "He described the new Constitution as a door opened 'for securing equal liberty, as never was before opened to any people upon earth.'" Curry, *supra* note 10, at 194 (quoting Elliot Debates, *supra* note 203, at 151).

Court's work resonates with the ideas of Williams. This is all the more notable because the Court has only rarely cited Williams,²¹² instead relying mainly on the ideas of John Locke, Thomas Jefferson, and James Madison in fashioning First Amendment law. The imprint of Williams' ideas, in the work of the Court, can be traced to the fashioning of both individual and institutional protections, as Williams had originally envisioned the strategy for religious freedom. From an individual perspective, the main connection between the two is the rooting of belief in conscience and freedom from coercion thereof, and governmental neutrality (including equality and tolerance of others' conscience). The main institutional similarities include separation, different jurisdictions for church and state, the securing of social peace, and nonestablishment of religion. This Part surveys the resonance of Williams' thought in the Court through this format.

A. *Individual Protections*

1. *Conscience*

Like Roger Williams, the Court roots religious freedom in the inviolability of individual conscience, phrased in modern rights language as "an important area of privacy which the First Amendment fences off from government."²¹³ As elaborated on in contemporary First Amendment law:

[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among

212. See generally *Lee v. Weisman*, 505 U.S. 577, 608 n.11 (1992) (Blackmun, J., concurring) (noting Roger Williams was the first to view the Establishment Clause as a means to protect churches); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 214 (1963) ("[T]he views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.") (footnote omitted); *Engel v. Vitale*, 370 U.S. 421, 434 n.20 (1962) (stating Williams "was one of the earliest exponents of the doctrine of separation of church and state.").

213. *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

"religions"—to encompass intolerance of the disbeliever and the uncertain.²¹⁴

No case represents the idea of inviolability of conscience better than *Lee v. Weisman*, where the Court invalidated the rendering of a prayer at a middle school graduation because of significant state participation in the composition of the prayer, and because the rendering of the prayer created a conflict of conscience for those students torn between their cause of conscience and desire to conform.²¹⁵ Picking up, seemingly, from Roger Williams' cause of conscience, the Court observes:

A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people. To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves.²¹⁶

That the Court so defines freedom—located in belief and conscience—illustrates the power and prescience of Roger Williams' thought. It is also worth observing that, like Williams, the Court recognizes that conscience might conflict with the aims of government. To resolve that conflict, the Court, significantly, calibrates religious freedom from the perspective of the dissenter: "[F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real."²¹⁷ Where there is a "real conflict of conscience It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her

214. *Wallace v. Jaffree*, 472 U.S. 38, 53-54 (1985) (footnotes omitted); see also *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.").

215. 505 U.S. 577 (1992). In its rooting of freedom in conscience, *Lee* stands at the top of the Court's long line of school prayer cases. See, e.g., *Schempp*, 374 U.S. 203; *Engel*, 370 U.S. 421.

216. *Lee*, 505 U.S. at 592.

217. *Id.* at 593.

rights and benefits as the price of resisting conformance to state-sponsored religious practice."²¹⁸ In Williams' time the location of freedom in conscience was itself novel. A conflict between conscience and the state was most likely to be resolved in favor of the state. By the time of *Lee*, by contrast, we observe the Court's freeing of conscience from the coercive power of the state pursuant to modern rights doctrine. In this way, *Lee* attests to the revolution of constitutionalism.²¹⁹ With conscience as the foundation of religious freedom, the Court, too, then relies on Williams' core idea: persecution or coercion of conscience is the "bloody tenet."

2. Coercion

Freedom from coercion of conscience is a touchstone of religious freedom that runs deep in the Free Exercise jurisprudence of the Court. As far back as *Cantwell v. Connecticut*, the Court observed that the Free Exercise Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship."²²⁰ More recently, the Court observed, in *School District of Abington Township v. Schempp*, that "a violation of the Free Exercise Clause is predicated on coercion . . . [a] show[ing] [of] the coercive effect of the enactment as it operates against him in the practice of his religion."²²¹ While today it is a matter of some debate whether a showing of coercion is a precondition to establishing a Free Exercise violation,²²² certainly a showing of coercion is sufficient to make out a violation.

218. *Id.* at 596.

219. Of course, as the *Lee* Court observes: "[N]ot . . . every state action implicating religion is invalid if one or a few citizens find it offensive We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity." *Id.* at 597-98.

220. 310 U.S. 296, 303 (1940).

221. 374 U.S. 203, 223 (1963).

222. Compare *Lee*, 505 U.S. at 592 (noting that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools") (citations omitted), and *Schempp*, 374 U.S. at 223 (stating that "a violation of the Free Exercise Clause is predicated on coercion"), with *Lee*, 505 U.S. at 604 (Blackmun, J., concurring) (suggesting proof of governmental coercion is not necessary to prove an Establishment Clause violation); *id.* at 618 (Souter, J., concurring) (discussing instances in which the Court declared invalid many "noncoercive state laws and practices conveying a message of religious endorsement"), and *Wallace v. Jaffree*, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring) (distinguishing a state-sponsored moment of silence in

Freedom from coercion of conscience is a core postulate of the Free Exercise Clause. Starting with *West Virginia Board of Education v. Barnette*,²²³ the Court has recognized that the coercive effect of compulsory affirmation of belief, such as the compulsory flag salute there at issue, violates the freedom of conscience at the root of religious freedom. The line of school prayer cases²²⁴ further substantiates the truncation of conscience caused by participation in state sponsored group prayer exercises.²²⁵

The major cases successfully making out a violation of the Free Exercise Clause too can be supported on the coercion of conscience justification. In *Sherbert v. Verner*,²²⁶ the landmark Free Exercise case establishing the traditional strict scrutiny framework for assessing a Free Exercise claim, the Court predicated its finding on the core idea that a state "may not constitutionally apply the eligibility provisions [for unemployment compensation] so as to constrain a worker to abandon his religious convictions respecting the day of rest."²²⁷

Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.²²⁸

Likewise, in *Wisconsin v. Yoder*,²²⁹ the Court predicated its finding of a violation of the Free Exercise Clause on the fact the Wisconsin compulsory education law "compels them [the Amish], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."²³⁰ This carried "a very real threat of undermining the Amish community and reli-

public schools from a state-sponsored vocal prayer on the grounds that the latter, while not explicitly coercive, was a "manifestly religious exercise").

223. 319 U.S. 624 (1943).

224. See, e.g., *Lee*, 505 U.S. 577; *Schempp*, 374 U.S. 203; *Engel*, 370 U.S. 421.

225. See *Lee*, 505 U.S. at 592.

226. 374 U.S. 398 (1963).

227. *Id.* at 410.

228. *Id.* at 404.

229. 406 U.S. 205 (1972).

230. *Id.* at 218 (citing *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)).

gious practice"²³¹ These cases demonstrate that, in the area of conscience, the teachings of Roger Williams remain vital today.

3. *Governmental Neutrality: All Faiths Tolerated, None Persecuted*

The theme of governmental neutrality in the face of different religions is another strong resonance of the work of Roger Williams in the Court's jurisprudence. The idea of neutrality has two meanings, both for Williams and the Court. First, neutrality is a guarantee of nonpreferentialism among different religions. As such, neutrality safeguards the dignity of each individual's conscience. This aspect of neutrality is an individual protection, and accordingly, will be evaluated here. A second idea of neutrality is separation of church and state on account of the teaching of history that when government favors one religion over another, powerful groups will curry favor with the government in an attempt to bring about a fusion of church and state.²³² This is, obviously, an institutional strategy of religious protection, with strong parallels to the argument for separation of church and state, and will be discussed in the section covering institutional protections.

Roger Williams advocated official neutrality over matters of conscience so that all persons would have an equal chance to pursue their beliefs free from the coercive power of the state. One person's act of conscience stood, on an official plane, equal to others. At bottom, this idea of neutrality was a principle of nondiscrimination and tolerance for believers.

These ideas resonate strongly in the jurisprudence of the Court. Starting with *Everson v. Board of Education*, the seminal Establishment Clause case, a fundamental tenet of American religious freedom is that government may not "aid one religion, aid all religions, or prefer one religion over another."²³³ Instead, the First Amendment "requires the state to be . . . neutral in its relations with groups of religious believers and non-believers State power is no more to be used so as to handicap religions than it is to favor them."²³⁴ This principle has been consistently articulated,²³⁵

231. *Id.*

232. *See Engel v. Vitale*, 370 U.S. 421, 431 (1962).

233. 330 U.S. 1, 15 (1947).

234. *Id.* at 18.

and applied to invalidate governmental preference of one religion over another and, even, religion over nonreligion.²³⁶

From an individual perspective, official neutrality facilitates voluntary choice concerning religion, free from state compulsion.²³⁷ A state preferencing of religion sends "a message that religion or a particular religious belief is *avored* or *preferred*,"²³⁸ tending to divide religion along such preferred lines. Instead, official neutrality provides that there is an equality of opportunity in the realm of religious belief: "[A]ll creeds must be tolerated and none favored."²³⁹ Religious freedoms are equally available to all—to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."²⁴⁰ As Roger Williams instructed, "[a]bhorrence of religious persecution and intolerance is a basic part of our heritage."²⁴¹

235. See *Lee v. Weisman*, 505 U.S. 577, 611-12 (1992); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (Brennan, J., plurality opinion); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *School Dist. of Abington v. Schempp*, 374 U.S. 206, 216 (1963).

236. See *Texas Monthly, Inc.*, 489 U.S. at 17 (Brennan, J., plurality opinion) (discussing how the Court struck down tax exemption benefiting only religious periodicals, even though not preferencing one religion over another, because statutory preference for religious publications "effectively endorses religious belief."); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (discussing how the Court struck down Maryland constitutional requirement that state public officials declare belief in God because government "can[not] constitutionally pass laws or impose requirements which aid all religions as against non-believers.").

237. See *Lee*, 505 U.S. at 592 ("A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."); *Schempp*, 374 U.S. at 222 ("And a further reason for neutrality is found in the Free Exercise Clause, which recognizes . . . the right of every person to freely choose his own course . . . free of any compulsion from the state. This the Free Exercise Clause guarantees.").

238. *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment)) (emphasis added).

239. *Lee*, 505 U.S. at 590.

240. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985); accord *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (stating the state "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*"); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593 (1940) ("The First Amendment . . . secure[s] to every sect the free exercise of its faith.").

241. *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

B. *Institutional Protections*

Like Roger Williams, the Court has sought to protect religious freedom, not only through individual freedoms, but also a range of institutional protections by which the affairs of state would be disentangled from those of religion. The Court's strategy, in fact, mirrors Williams' in a general way: separation, different jurisdictions, and nonestablishment.

1. *Separation*

Roger Williams' most famous institutional argument was, of course, the placement of a "wall of Separation between the Garden of the Church and the Wilderness of the world"²⁴² to protect the purity of the church, but also free the state from the obligation to act divine and thereby more easily address the common welfare. As noted, the Court credits Thomas Jefferson with this idea, even though Williams' articulation of the thought predated Jefferson's by some 150 years.²⁴³

Certainly the "wall of separation" metaphor has played a prominent role in the Court's thinking, going back to *Reynolds v. United States*.²⁴⁴ In the modern era, starting with *Everson*, the Court first emphasized a rather strict form of separation, at least rhetorically.²⁴⁵ Justice Rutledge, in his *Everson* dissent, captured this sense well: "[T]he object [of the Establishment Clause] . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."²⁴⁶ Numerous cases followed this separationist interpretation, especially in the context of state aid to schools.²⁴⁷ The (in)famous *Lemon v. Kurtz-*

242. Cotton's Letter Examined, *supra* note 1, at 392.

243. See *supra* note 3 and accompanying text. There is no evidence that Jefferson took the idea from Williams.

244. 98 U.S. 145, 164 (1879).

245. 330 U.S. at 16, 18.

246. *Id.* at 31-32 (Rutledge, J., dissenting).

247. See, e.g., *Wolman v. Walter*, 433 U.S. 229 (1977) (invalidating the state's funding of instructional equipment and paying the costs of field trips in nonpublic schools to students in nonpublic schools); *Sloan v. Lemon*, 413 U.S. 825 (1973) (invalidating reimbursement of nonpublic schools for costs on teacher's salaries and materials used in secular courses).

man test might be thought of as an attempt to construct a separationist strategy.²⁴⁸

More recent cases have moved away from the "wall of separation" metaphor, first blurring the distinction,²⁴⁹ and then seemingly abandoning it.²⁵⁰ The dissonance in the Court's view goes back, of course, to the early cases, like *Everson*, which employed separationist rhetoric, while rendering an accommodationist result.²⁵¹ Certainly it is easier to announce the principle than apply it.

2. *The Different Jurisdictions of Church and State*

Roger Williams was the first American to theorize about religious freedom through the identification of different jurisdictions for church and state, an amplification of his argument for separation. With each separate from the other, both stood a better chance to thrive. Social peace might thereby be secured. This was among the most innovative of Williams' arguments, one which resonates well in the jurisprudence of the Court.

Numerous strands of Williams' thought are evident in the Court's decisions. First, the union of government and church will result only in harm to both. Second, therefore, protections of religious freedom must be designed to keep government out of religion, and religion out of government, to the extent possible. Third, certainly no part of government can be involved in judging religion. Fourth, government should also not interfere with conscience and belief. And fifth, while government is disesteemed from entering the

248. 403 U.S. 602, 612-13 (1971). To find a violation of the Establishment Clause, the test holds: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an excessive government entanglement with religion." *Id.*

249. See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("[T]he metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state Nor does the Constitution require complete separation of church and state."). Even in *Lemon*, the Court observed: "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U.S. at 614.

250. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (invalidating state sponsored creche, but validating state sponsored menorah on endorsement, not separation, theory).

251. In *Everson*, the Court sustained the state's provision of bussing costs for Catholic school children. 330 U.S. at 18.

sphere of religion, it has a role to play in effectuating the common good.

Exploring this affinity more carefully, first, the Court reads the lesson of history, as Williams, to instruct that a union of government and church will result in harm to both. "The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs."²⁵² The harm to religion from such a union is the "risk . . . [to] freedom of belief and conscience,"²⁵³ certainly the cornerstone of Williams' theory of religious freedom. The harm to government is its "abandon[ment of] its obligation as guarantor of democracy."²⁵⁴ Thus, we can conclude, as the Court: "[t]he lessons of the First Amendment are as urgent in the modern world as in the eighteenth century when it was written."²⁵⁵ These were also the lessons of Williams, in the seventeenth century, which he experienced, wrote about, and prophesized.

Second, in view of such lesson, the best strategy for religious freedom is to keep each out of the way of the other. As the Court has explained, "[t]he objective is to prevent, as far as possible, the intrusion of either into the precincts of the other."²⁵⁶ One way of accomplishing this is pursuit of the "wall of separation" metaphor discussed above.²⁵⁷ Another way is by removing from government the power to legislate over religion, echoing Williams' idea: "The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief."²⁵⁸ For this proposition, the Court has cited, ap-

252. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

253. *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

254. *Id.* at 607 (Blackmun, J., concurring).

255. *Id.* at 592.

256. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

257. *See supra* notes 242-46 and accompanying text.

258. *McGowan v. Maryland*, 366 U.S. 420, 465-66 (1961); *accord Lemon*, 403 U.S. at 625 ("Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963) (stating a measure advancing or inhibiting religion "exceeds the scope of legislative power as circumscribed by the Constitution.").

provingly, Williams,²⁵⁹ although it is clear that the Court is guided more by John Locke's jurisdictional argument than Williams'.²⁶⁰

Third, since government has no power over religion, it certainly has no business judging religion. This, of course, is one of Williams' core arguments, as also approvingly cited by the Court in *Engel v. Vitale*.²⁶¹ This idea, in part, has led to the Court's long-held reluctance to judge the legitimacy of religion or religious belief.²⁶²

Fourth, government also certainly has no power over conscience and belief. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'"²⁶³

Fifth, and last, while belief and conscience are beyond governmental authority, government has a legitimate role to play in realizing the common good. Roger Williams himself struggled in working out the line between religious freedom and civil jurisdiction.²⁶⁴ The Court too has struggled over this line.²⁶⁵

259. See *Engel v. Vitale*, 370 U.S. 421, 434 n.20 (1962).

260. See, e.g., *Schempp*, 374 U.S. at 231 (Brennan, J., concurring).

261. 370 U.S. at 434 n.20 ("To Williams, it was no part of the business or competence of a civil magistrate to interfere in religious matters . . .").

262. See *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.") (citations omitted); *Schempp*, 374 U.S. at 245 (Brennan, J., concurring) ("[T]he First Amendment forbids governmental inquiry into the verity of *religious* beliefs."); *United States v. Ballard*, 322 U.S. 78, 87 (1944) ("Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.").

263. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 877 (1990) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)); *accord* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940):

Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief. Propagation of belief—or even of disbelief—in the supernatural is protected, whether in church or chapel, mosque or synagogue, tabernacle or meeting-house.

Id. at 593.

264. See *supra* notes 83-112 and accompanying text.

265. The early work of the Court followed the simple dichotomy of protection of belief, but not action, advocated by John Locke and, to a degree, by Thomas Jefferson. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961) ("[T]he legislative powers of government reach actions only, and not opinions . . .") (alterations in

3. *Social Peace*

Protecting church and state from each other had the added objective, in Roger Williams' view, of securing social peace, no small accomplishment in the time of Williams. The securing of social peace is a necessary precondition to the flourishing of a pluralistic society, which had some roots in Williams' day but most certainly is a state of affairs today.

The theme of securing social peace is a central concern of the Court. In *Engel*, the Court noted the disruption of social peace, in sixteenth century England, caused by governmental establishments of religion, such as officially approved prayer and forms of worship.²⁶⁶ The resulting social divisiveness formed a rationale for the Court's conclusion that "government . . . should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people . . ."²⁶⁷ In *Lemon v. Kurtzman*, the Court observed: "political division along religious lines was one of the principal evils against which the First Amend-

original) (quoting 8 Works of Thomas Jefferson 113); *Reynolds v. United States*, 98 U.S. 145, 166 (1879) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

With the landmark case of *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court recognized that religiously-inspired acts too might, in the right circumstance—like the Seventh Day Adventist's refusal on religious grounds to work Saturdays—merit protection as religious freedom. See *id.* at 409-10. *Sherbert* thereby represents a move in the direction of Williams who, while advocating obedience to general laws addressing the common welfare, also recognized certain religiously inspired acts as acts of conscience meriting religious protection. See *supra* notes 83-112 and accompanying text.

In *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 878-82 (1990), the Court held that religiously inspired smoking of peyote was nevertheless subject to the criminal law, the Court has returned to the position of John Locke that religious claims do not excuse compliance with general laws. See Locke, *supra* note 55, at 172-75.

266. 370 U.S. at 425-27.

267. *Id.* at 435. In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court stated: The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases. The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment
Id. at 587-88.

ment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process."²⁶⁸

4. *Nonestablishment*

Roger Williams argued against established churches because he believed they coerced belief, caused persecution, and made for an unseemly alliance between church and state to the detriment of each. His essential argument was against the establishment of a national church which, as we have seen, outlined the basic argument against establishments generally.²⁶⁹ The core of Williams' argument resonates in the Establishment Clause.

In *Everson v. Board of Education*, the Court echoed the essence of Williams' idea:

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 form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.²⁷⁰

268. 403 U.S. 602, 622 (1971) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970) (Harlan, J., separate opinion)); see also Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1692 (1969) (discussing why religious guarantees, unlike other basic guarantees such as freedom of the press, and search and seizure, should be left out of the political process). In *Lemon*, the Court invalidated the state salary supplement to religious teachers based, in part, on "[t]he potential for political divisiveness" aggravated by its "need for continuing annual appropriations . . ." 403 U.S. at 623.

269. See *supra* notes 165-74 and accompanying text.

270. 330 U.S. 1, 15-16 (1947) (emphasis added). Compare *id.* (noting that governments must not be active endorsers of religious or give preferential treatment to one religion over another), with Williams' idea *supra* notes 167-74 and accompanying text (noting that all churches were equal and thus no church could claim sanctions over another).

Since *Everson*, the Court has been working on more sophisticated definitions of establishments, such as that in the *Lemon* case,²⁷¹ as it has sought, until recently, to realize a separationist vision.

Like Williams, the Court has often drawn on the history of England to illustrate the danger of establishments. In *Engel*, for example, the Court recited the same English history so instructive to Williams. The "very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America."²⁷² Echoing the thoughts of Williams, the Court continued:

The controversies over the Book [of Common Prayer] and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular ruler that happened to be in control at the time

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power.²⁷³

Like Williams, the Court observes the lesson of history.

The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the

271. 403 U.S. at 612-13 ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'") (quoting *Walz*, 397 U.S. at 668) (citations omitted).

272. *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

273. *Id.* at 426, 429.

pressures of government for change each time a new political administration is elected to office.²⁷⁴

Through the foregoing assessment of the Court's jurisprudence against the background of Roger Williams' thought, we discern the continuing resonance of Williams' ideas. That Williams' ideas yet ring so clearly and presciently is a major testament to the originality and power of his thought.

V. THE SIGNIFICANCE OF ROGER WILLIAMS

Roger Williams developed the main ideas on religious freedom that underlie our First Amendment. These ideas include the inviolability of conscience in matters of faith, the decrying of coercion of conscience, and advocacy of tolerance and equality for contrasting claims of conscience. These thoughts form a fundamental component of our Free Exercise Clause protections. Roger Williams also advanced the idea of separation of church and state to protect each from the other; identified separate jurisdictions for church and state so that the claims of one would be insulated from the other, and thereby secure social peace; and advocated nonestablishment of religion as a guarantee of religious freedom and democratic integrity. These ideas comprise the core of our Establishment Clause guarantees. The problems contemplated by Roger Williams, and their solution, still occupy the Supreme Court today. Yet, Williams' influence on the framing of the First Amendment is indirect, at best, and his influence on the Court is not substantial. Perhaps a reassessment of Williams' place in the development of ideas is in order, especially as to how religious freedoms should unfold.

Looking beyond the history of the First Amendment, Roger Williams stands out as the very first American, and among the most original, thinkers on religious freedom and church-state relations. He was, in actuality, a prophet on the relation of man's soul to civil society, foreseeing a course for individual dignity and social success well ahead of his time. Williams' work, and the example he set in his life, are a testament to the idea that freedom is a condition of the human spirit.

Owing to the power of his thought and the courage of his convictions, Williams still speaks to us today—as a man of honor and

274. *Id.* at 429-30.

fortitude who sought to work out a way by which he could be true to his soul and yet function honestly in the world. This was no small task, in his world or our world. Balancing individual integrity against social demands is always problematic. But, Williams was successful in this endeavor, and he has much to teach us. One timeless lesson is to be true to oneself. Yet, in doing so, one must also learn to appreciate the claims of others. No person can be so sure of truth, or his way, as to justify imposing it on others. Tolerance and respect of others, amidst diversity, are virtues necessary to self-respect and social cohesion. In these ways, Williams demonstrated that it is possible to achieve religious freedom in society, for all, and that the two can coexist peaceably. We can thus see that Williams was as much a social, as religious, prophet. These lessons of Williams are an enduring legacy.