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## In Search of an Established Church

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# In Search of an Established Church

Teresa M. Bejan\*

## INTRODUCTION

I approach the question guiding this Symposium as a political theorist, as well as a historian of political thought. I approach it, too, as an American—albeit one who has lived and taught for many years overseas. The politics of religion in the United States fascinates me, personally and professionally. I am interested above all to understand the way in which past ways of thinking and doing have affected—and continue to affect—how we think about politics, and how we do things politically, today.

For many political theorists, the question “Is America a Christian Nation?” will provoke a straightforward—“no.” Empirically, while a strong majority (65% in 2019) of Americans still identify as Christian when asked, that number has declined sharply over the past decade.<sup>1</sup> At the same time the rise of the “Nones,” i.e., those Americans who claim no religious affiliation, identified by Robert Putnam and David Campbell in 2010 proceeds apace.<sup>2</sup> More important than the facts—for political theorists anyway—is the theory. And in theory, the United States of America is a liberal democracy, one of many in Europe and the global Anglosphere, defined by its commitment to the separation of church and state, individual rights, and religious pluralism.

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1. *In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RESEARCH CTR. (Oct. 17, 2019), <https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/> [<https://perma.cc/W2ZW-QKB6>].

2. *See generally* ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* (2010).

The United States is thus, aspirationally at least, a *secular* state. While the vast majority of Americans in this era and others have been Christians, on the national level the state is committed to disestablishment—that is, to the absence of public subsidies to religion or formal relations between the government and any particular church—as well as to observing an impartial “neutrality” between the religions of its citizens as far as any accommodations or exemptions from generally applicable laws are concerned. Indeed, the leading liberal political philosopher of the twentieth century, John Rawls, had America in mind as a model when he described the challenges facing a nearly “well-ordered” liberal society characterized by pluralism in its citizens’ “comprehensive doctrines” and an imperfectly “overlapping consensus” among them on the political (but not metaphysical) conception of justice governing its public institutions.<sup>3</sup>

On this view, the formal separation of church and state—institutionally, symbolically, and above all financially—appears as essential in securing the secularism of liberal democracies. And yet, even political theorists admit that this principle has manifested very differently in different places. French secularism, or *laïcité*, is notoriously aggressive, extending even to an intolerance of the display of religious symbols by private citizens in public places.<sup>4</sup> Secular liberal democracy looks different in Germany and the Netherlands as well, countries in which state-funding and support for religion are seen as consistent with secularism, so long as that support is not limited to any single denomination.<sup>5</sup> And, of course, established churches remain alive and well not only among the social democracies of Scandinavia,<sup>6</sup> but in the United Kingdom, too,

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3. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997) [hereinafter Rawls, *Public Reason Revisited*], reprinted in JOHN RAWLS, *POLITICAL LIBERALISM* 440, 440, 462, 482 (expanded ed., 2005) [hereinafter RAWLS, *POLITICAL LIBERALISM*]. Rawls disfavored the term “neutrality” in his work. RAWLS, *POLITICAL LIBERALISM*, *supra*, at 190–91.

4. Cecile Laborde, *Toleration and laïcité*, in *THE CULTURE OF TOLERATION IN DIVERSE SOCIETIES* 161, 161 (Catriona McKinnon & Dario Castiglione eds., 2018).

5. See Tariq Modood, *Muslims, Religious Equality and Secularism*, in *CONTESTING SECULARISM: COMPARATIVE PERSPECTIVES* 69, 81–83 (Anders Berg-Sorensen, ed., 2013).

6. Sweden and Norway have formally disestablished their national churches, but the Protestant national church of Denmark remains. T. R. Reid,

where the Churches of England and Scotland and their clergy continue to enjoy state funding and privileges not extended to other faiths.<sup>7</sup>

In her recent book, *Liberalism's Religion*, the political theorist Cecile Laborde accepts this diversity as consistent with liberal egalitarian principles. Moreover, she denies that state neutrality is a necessary—or even plausible—generalization of “the old idea of religious nonestablishment” or church-state separation.<sup>8</sup> In this, she gives ground to liberalism’s critics, above all scholars of critical religion like the late Saba Mahmood, Winnifred Sullivan, and Stanley Fish.<sup>9</sup> These critics argue, *inter alia*, that not only is the liberal presumption of neutrality an insupportable pretense, one masking an arbitrary exercise of power, but that the “liberalism” of liberal democratic societies is itself a form of hegemonic (if submerged) Protestant Christianity, one that demands that all other religions recreate themselves in its own image.<sup>10</sup>

On this view, liberal democracies like the United States have an established religion—namely, Protestantism—even though they do not have an established church. While she rejects this conclusion, Laborde agrees with the critics thus far—that many liberal political theorists lack imagination when it comes to the

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*Church of Sweden Is Thriving on Its Own*, WASH. POST (Dec. 29, 2000), <https://www.washingtonpost.com/archive/politics/2000/12/29/church-of-sweden-is-thriving-on-its-own/2a52605f-40c4-43f6-b1cd-9c16f7b27a4e/> [<https://perma.cc/SS23-T2ZB>] (Sweden); Elin Hofverberg, *Norway: State and Church Separate After 500 Years*, LIBRARY OF CONG. (Feb. 3, 2017), <https://www.loc.gov/law/foreign-news/article/norway-state-and-church-separate-after-500-years/> [[perma.cc/L7MH-U7PB](https://perma.cc/L7MH-U7PB)] (Norway); *Religion and Identity*, DENMARK, <https://denmark.dk/people-and-culture/religion> [<https://perma.cc/W9CP-N2NK>] (last visited Apr. 1, 2021).

7. See generally THE CHURCH OF SCOTLAND, <https://www.churchofscotland.org.uk/home> [[perma.cc/2V9Q-MSJA](https://perma.cc/2V9Q-MSJA)]; THE CHURCH OF ENGLAND, <https://www.churchofengland.org/> [[perma.cc/65PM-8HK4](https://perma.cc/65PM-8HK4)].

8. CECILE LABORDE, *LIBERALISM'S RELIGION* 19, 69 (2017).

9. See generally SABA MAHMOOD, *RELIGIOUS DIFFERENCE IN A SECULAR AGE: A MINORITY REPORT* (2016); WINNIFRED SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (new ed. 2018); Stanley Fish, *Mission Impossible: Settling the Just Bounds between Church and State*, 97 COLUM. L. REV. 2255 (1997). For other works on the topic, see generally TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003); ELIZABETH SHAKMAN HURD, *BEYOND RELIGIOUS FREEDOM: THE NEW GLOBAL POLITICS OF RELIGION* (2015).

10. For a survey of these criticisms, see LABORDE, *supra* note 8, at 19–25.

variety of practices consistent with their principles.<sup>11</sup> She describes two societies, “Secularia” and “Divinitia”: the former strictly secular in all respects, while the latter formally recognizes one particular religion, both in its public symbols and its laws, while protecting and providing exemptions for others.<sup>12</sup> Laborde concludes that “both are legitimate liberal states . . . [and] in practice, liberal democratic states exhibit features of both.”<sup>13</sup> Her analysis suggests, moreover, that liberal objections to the latter are more often a reflection of prejudice than principle. When it comes to the question before us, then, Laborde might respond that the United States *could* be a Christian nation, if it wanted to be, without losing its liberal democratic character.

Laborde’s analysis is powerful and, I think, persuasive.<sup>14</sup> Still, it will leave many Americans uneasy. Any student coming from the United States to study at Oxford, for example, will not be alienated by the sacred architecture, which has been copied by many self-styled temples of learning in her own land. But the presence of Anglican chapels and chaplains at the center of collegiate life in a publicly-funded university cannot help but be offensive to American mores. It violates directly the principle of disestablishment—what Thomas Jefferson described “as a wall of separation between Church & State”—that Americans take to be the *sine qua non* of secular liberalism.<sup>15</sup>

Here, Americans can appeal and do, as is our wont, to the First Amendment. In its very first clause (“Congress shall make no law respecting an establishment of religion”<sup>16</sup>), one finds the rock on which our nation failed to build its Church. While the meaning of

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11. *See id.* at 19–25.

12. *Id.* at 151–52.

13. *Id.* at 152.

14. *See* Teresa Bejan, *Liberalism’s Parish: On Liberalism’s Religion*, SYNDICATE THEOLOGY (2019), <https://syndicate.network/symposia/theology/liberalisms-religion/> [perma.cc/AX7W-94N7].

15. Thomas Jefferson, Draft Reply to the Danbury Baptist Association, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0002> [https://perma.cc/E6NA-LKW8] (last visited Apr. 1, 2021). When state support is offered, as in the case of some parochial schools in the United States, that support is available to all, not enjoyed as a privilege by any particular church and its personnel. *See, e.g.,* *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020).

16. U.S. CONST. amend. I, cl. 1.

the Establishment Clause has been much debated,<sup>17</sup> James Madison's draft language on which the final text was based seems clear enough: "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established . . ."<sup>18</sup> As the constitutional historian Jack Rakove points out, Madison and Jefferson were of one mind in seeing the public maintenance of any particular religion or its personnel as a violation of the equal right of all citizens to the liberty of conscience, by compelling them to support, financially or otherwise, a faith contrary to their own.<sup>19</sup>

On this view, the quintessentially *American* answer to the question, "Is America a Christian nation?," must be, doubly—"no." From its inception, the United States has had no established religion, nor any established or national Church.<sup>20</sup> There is a well-known historical narrative shared by political theorists, as well as constitutional lawyers and legal historians, that traces this disestablishmentarian view of liberty of conscience through Jefferson to the first English saint of secular liberalism, John Locke (1632–1704).<sup>21</sup> Still, others prefer a narrative starting closer to home, noting that Roger Williams (c.1603–1683) of Rhode Island

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17. Compare, e.g., Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 417 (2002) (positing that "an accurate account of the intellectual origins of the Establishment Clause does not, and cannot, provide a definitive answer to the question of what exactly the Establishment Clause prohibited then or prohibits now"), and NOAH FELDMAN, *DIVIDED BY GOD* 19–56 (2005) (criticizing both traditional and revisionist histories of the First Amendment), with Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PA. J. CONST. L. 585, 639 (2006) (arguing that a true commitment to "the original meaning of the Establishment Clause requires the disincorporation of the provision" to the states).

18. Donald L. Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427, 430 (1983).

19. See JACK RAKOVE, *BEYOND BELIEF, BEYOND CONSCIENCE: THE RADICAL SIGNIFICANCE OF THE FREE EXERCISE OF RELIGION* 66–100 (2020).

20. There were, of course, established churches in some of the original thirteen states, including Massachusetts, Muñoz, *supra* note 17, at 601, 605–06, a point I return to below.

21. E.g., FELDMAN, *supra* note 17, at 29–31; PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 53–55 (2002); cf. *Everson v. Bd. of Ed.*, 330 U.S. 1, 11–13 (1947) (viewing Jefferson's participation in the passage of Virginia's Bill for Religious Freedom as instructive of the meaning of the First Amendment's religion clauses).

used the phrase “wall of separation” more than a century and a half before Jefferson.<sup>22</sup> The political theorist and law professor Martha Nussbaum has elevated Williams as America’s “First Founder” on this basis, as well as presenting him as the first in a long line of thinkers in a secular liberal tradition culminating in Rawls himself.<sup>23</sup>

In my first book, *Mere Civility: Disagreement and the Limits of Toleration*, I argued that the self-understanding of American liberals like Nussbaum as descendants of Locke and Williams reflects a widespread misunderstanding of those thinkers’ actual views on religious toleration, as well as the historical process by which our peculiar “First Amendment faith” developed.<sup>24</sup> In this essay, I shall focus more narrowly on the issue of (dis)establishment and consider how each of the three thinkers—Williams, Locke, and Rawls—identified as pillars of American secular liberalism by scholars understood it as a necessary implication (or not) of their prior commitments to the separation of church and state.

I begin by offering an overview of the significance of early modern toleration debates for the development of political liberalism, before providing a brief survey of the seventeenth-century historical context within which Anglophone debates about disestablishment took place. This was, crucially, an *establishmentarian* context, wherein toleration was figured as a problem caused by “dissenting” individuals and congregations, who could or could not be “indulged” or “comprehended” by the episcopal

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22. For more on the relationship between Williams and Jefferson and the “wall of separation,” see generally JOHN M. BARRY, *ROGER WILLIAMS AND THE CREATION OF THE AMERICAN SOUL* (2012); DANIEL DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002); TIMOTHY HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* (1998); ALAN E. JOHNSON, *THE FIRST AMERICAN FOUNDER: ROGER WILLIAMS AND FREEDOM OF CONSCIENCE* (2015); Benjamin J. Hertzberg, *Religion’s Influence on the Wall of Separation: Insights from Roger Williams, James Burgh, and Thomas Jefferson*, 23 SIGMA J. POL. & INT’L STUD. 1 (2005).

23. Martha Nussbaum, *The First Founder: the American Revolution of Roger Williams*, NEW REPUBLIC (Sept. 10, 2008), <https://newrepublic.com/article/61558/the-first-founder> [perma.cc/UA62-M7AS]; see generally MARTHA NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008).

24. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 29–30 (2012) (describing Americans’ “First Amendment faith”). See generally TERESA M. BEJAN, *MERE CIVILITY: DISAGREEMENT AND THE LIMITS OF TOLERATION* (2017).

Church of England.<sup>25</sup> As we shall see, neither Williams nor Locke viewed the problem with establishment as solely—or even primarily—a matter of individual liberty of conscience, nor did they understand established churches simply as the beneficiaries of state-maintenance or financial support, but as properly representative and “public” institutions at the heart of the *res publica*.<sup>26</sup> The point for both was rather that “National” churches like the Church of England encouraged a conflation of civil and spiritual communities and their respective standards of membership. This understanding produced counter-intuitive consequences for both Locke and Williams when it came to the formal, institutional, financial, or symbolic *disestablishment* of public churches, and whether it was or was not a requirement of their separationist principles.

In what follows, I argue that Williams advocated for disestablishment in a way recognizable to modern liberals, whereas Locke did not. Still, both saw a continuing place for what we today might think of as “established religion” in a tolerant society, even in the absence of a state-supported ecclesiastical establishment. For Williams, a tolerant society depended on what I call the *inadvertent establishment* of a form of evangelical and sectarian Protestantism in its legal regime; for Locke, it required rather the *informal establishment* of an irenic and liberal Protestantism in its public (albeit non-governmental) institutions, such as universities.

In light of this historical analysis, I then turn to modern liberalism and its understanding of religious toleration as expounded by John Rawls (1921–2002). I argue that Rawls himself was steeped in early modern debates to an underappreciated extent, and that this informed a parallel, neglected turn from an “evangelical” to an avowedly “irenic” form of liberalism in his thought. I conclude by suggesting that the latter, especially, is crucial for understanding American secular liberalism today, which functions (aspirationally, at least) not as an established religion, as its critics claim, but rather as an established church.

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25. See *infra* Part III.

26. See *infra* Parts IV and V; cf. Arash Abizadeh, *Publicity, Privacy, and Religious Toleration in Hobbes’s Leviathan*, 10 MOD. INTELL. HIST. 261, 284–91 (2013) (suggesting that contemporary thinkers recognized a difference between public acts by individuals and public institutions with respect to religious toleration).



## I. HAUNTED BY HISTORY

American jurists and legal historians look largely to the Founding generation to understand the meaning of the Establishment Clause. They remain generally disinclined to set these eighteenth-century debates in their broader historical context. This includes not only the various pre-revolutionary church-state arrangements of the British colonies of North America, but also the long-running religious conflicts that dominated post-Reformation Europe, which produced so many of the religious refugees—as well as arguments, concepts, and categories—that subsequently travelled to the New World.<sup>27</sup> Indeed, despite the eagerness of constitutional scholars to link American disestablishment with the theories of seventeenth-century thinkers like Williams and Locke, they have shown a remarkable disinterest in the English and European debates about toleration and religious establishment in which these figures were engaged.<sup>28</sup>

This scholarly neglect is in stark contrast with the almost obsessive attachment to early modernity as the origin of modern

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27. For a welcome corrective, see generally RAKOVE, *supra* note 19. For other excellent revisionist works by historians, see generally CHRIS BENEKE, *BEYOND TOLERATION: THE RELIGIOUS ORIGINS OF AMERICAN PLURALISM* (2006); JOHN COFFEY, *PERSECUTION AND TOLERATION IN PROTESTANT ENGLAND, 1558–1689* (2000); EVAN HAEFELI, *NEW NETHERLAND AND THE DUTCH ORIGINS OF AMERICAN RELIGIOUS LIBERTY* (2012); BENJAMIN J. KAPLAN, *DIVIDED BY FAITH: RELIGIOUS CONFLICT AND THE PRACTICE OF TOLERATION IN EARLY MODERN EUROPE* (2007); ANDREW R. MURPHY, *CONSCIENCE AND COMMUNITY: REVISITING TOLERATION AND RELIGIOUS DISSENT IN EARLY MODERN ENGLAND AND AMERICA* (2001); ANDREW R. MURPHY, *LIBERTY, CONSCIENCE, AND TOLERATION: THE POLITICAL THOUGHT OF WILLIAM PENN* (2016); SCOTT SOWERBY, *MAKING TOLERATION: THE REPEALERS AND THE GLORIOUS REVOLUTION* (2013); ALEXANDRA WALSHAM, *CHARITABLE HATRED: TOLERANCE AND INTOLERANCE IN ENGLAND, 1500–1700* (2006). For another recent exception that adopts a transatlantic perspective, see generally *THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY* (Michael D. Breidenbach & Owen Anderson eds., 2020).

28. See, e.g., Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1420–21, 1524–25 (2004) (discussing Locke and Williams' influence on early church-state debate without mention of wider contexts in which their arguments were made). For instance, Williams published all of his works in London during his lifetime, save the anti-Quaker polemic, *George Fox Digg'd out of his Burroves* (1676), published for a receptive audience in Boston. See HENRY CHUPACK, *ROGER WILLIAMS* 62 (1969).

liberalism among political theorists. The most striking version of the claim comes, fittingly enough, in Rawls's *Political Liberalism*: "the historical origin of political liberalism (and of liberalism more generally) is the Reformation and its aftermath, with the long controversies over religious toleration in the sixteenth and seventeenth centuries."<sup>29</sup> The story of liberalism as Rawls tells it is thus the story of the rise of religious toleration in early modern Europe and the gradual realization that political stability did not require religious unity—a realization that allowed for the extension of the principle of toleration to other forms of difference.<sup>30</sup>

This historical narrative is not *exactly* "Whig." Rather, it is a refined version of what would become the standard narrative about toleration among revisionist historians, including Herbert Butterfield, the man who coined the term "Whig History."<sup>31</sup> According to this narrative, the emergence of toleration in early modern Europe was *not* the inevitable unfolding of a philosophical principle of liberal Enlightenment.<sup>32</sup> It was not a product of principle at all, but rather the result of battle fatigue after a century of religious warfare.<sup>33</sup> It was, in Butterfield's words, "a last resort for those who often still hated one another, but found it impossible to go on fighting."<sup>34</sup>

This revisionist narrative has also been rehearsed by liberalism's critics, for whom it serves as further evidence that liberal secularism is both a product and an instrument of centralizing state power, Western imperialism, and Protestant mission. For thinkers like Mahmood or Wendy Brown, Locke serves

29. RAWLS, *POLITICAL LIBERALISM*, *supra* note 3, at xxiv.

30. *See id.* at xxvii–xxix (expanding that Rawls's views on political liberalism not only improve religious toleration but also toleration of other forms of difference, including race and gender).

31. HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 6 (1965); *see* KEITH C. SEWELL, *HERBERT BUTTERFIELD AND THE INTERPRETATION OF HISTORY* 30–31 (2005) (stating Whig history is the study of the past with reference to the present which is altered with historical fallacies put in place by those who are the "winners" in the historical context).

32. *See* Herbert Butterfield, *Toleration in Early Modern Times*, 38 *J. HIST. IDEAS* 573, 575–76 (1977).

33. *See id.* at 573, 575–78, 580, 584.

34. *Id.* at 573. Butterfield further stated, "[i]t was hardly even an 'idea' for the most part—just a happening—the sort of thing that happens when no choice is left and there is no hope of further struggle being worth while." *Id.*

as a sort of villain, and his notorious exclusion of Catholics and atheists from toleration in his famous 1689 *A Letter Concerning Toleration*—not to mention his own involvement in supporting missionary efforts in the Americas—is a smoking gun.<sup>35</sup> For them, liberal toleration boils down to a demand that all religions recreate themselves in the image of Protestant Christianity (as a belief-based, individualistic, and voluntaristic creed), which then suppresses or excludes all that do not.<sup>36</sup>

Of course, neither version of this story will satisfy historians. In the last two decades, abundant scholarship has troubled Butterfield's account of the "rise" of toleration, as well as the identity of liberalism and Locke's place within it. As Duncan Bell notes, Locke was only latterly elevated as liberalism's founding father, well into the nineteenth century.<sup>37</sup> Moreover, the "rise" of toleration after the Reformation (not to mention its "fall" beforehand) was hardly straightforward. To take only one example, the 1689 Act of Toleration, identified by Rawls as evidence of the principle of liberty of conscience being "largely won" in England,<sup>38</sup> was not an act of toleration at all, but one of "Indulgence" that suspended without repealing the existing penal laws mandating church attendance, and that only for Trinitarian Protestants.<sup>39</sup>

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35. See MAHMOOD, *supra* note 9, at 33, 48–49, 78; WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE 31–32 (2006); cf. Fish, *supra* note 9, at 2269–72 (noting that the omission of a general, independent principle of toleration in Locke's work reveals his reliance on a *de facto* exercise of power over religious minorities).

36. For other versions of this argument, see John Gray, *Pluralism and Toleration in Contemporary Political Philosophy*, 48 POL. STUD. 323, 323–25 (2000); Jakob De Roover & S. N. Balagangadhara, *John Locke, Christian Liberty, and the Predicament of Liberal Toleration*, 36 POL. THEORY 523, 524–25, 527, 531–32 (2008). For recent restatements of the "Protestantization" critique in arguments about the limits of Liberalism's approach to religious insult, see Talal Asad, *Free Speech, Blasphemy, and Secular Criticism*, in IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH 14, 17, 34, 47 (2013). But see Andrew F. March, *Speech and the Sacred: Does the Defense of Free Speech Rest on a Mistake about Religion?*, 40 POL. THEORY 319, 320, 322–24, 337–38 (2012).

37. See Duncan Bell, *What is Liberalism?*, 42 POL. THEORY 682, 692–93 (2014); cf. HELENA ROSENBLATT, THE LOST HISTORY OF LIBERALISM: FROM ANCIENT ROME TO THE TWENTY-FIRST CENTURY *passim* (2018) (examining a number of other important liberal thinkers).

38. See JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 11 (Samuel Freeman ed., 2008).

39. See *infra* Part II pp. 298–300.

Some of the most notorious examples of English intolerance, such as the Anti-Catholic Gordon Riots of 1780, were yet to come.<sup>40</sup>

So, too, for the critical religion narrative. Secular liberal principles of toleration and liberty of conscience may well have originated in majority-Protestant contexts, but “Protestantism” is itself a very various phenomenon.<sup>41</sup> In *Mere Civility*, I argued that the United States owes its peculiar constellation of individual rights to free exercise and expression in the First Amendment to the relative density and abundance in the colonies of sectarian evangelicals like Roger Williams.<sup>42</sup> But this kind of evangelical Protestant was never in the majority in England, let alone the countries of continental Europe. The variety of liberal democratic, church-state arrangements noted in the introduction similarly belies the idea that a single “Protestant” orientation can explain their emergence.<sup>43</sup> This is true especially with regard to the issue of establishment and the persistence of public churches in Europe. Furthermore, I agree with Laborde that the fact that some of the arrangements preferred by modern liberals originated in particular facets of Protestant theology or ecclesiology does not in itself disqualify them as inconsistent with liberals’ normative principles of liberty and equality.<sup>44</sup> Indeed, they would seem rather to enjoy a presumption of being at least *more* consistent than the alternatives evidently imagined, if not articulated, by liberalism’s critics.<sup>45</sup>

Still, the extent to which the *language* of liberal political theory and jurisprudence reveals its early modern origins is remarkable. Theorists prefer to use the emphatically early modern coinage of “toleration” over “tolerance,” as well as terms like “establishment,”

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40. See, e.g., *The Gordon Riots*, U.K. NAT’L ARCHIVES, <https://www.nationalarchives.gov.uk/pathways/blackhistory/rights/gordon.htm> [<https://perma.cc/VE2U-PN62>] (last visited Apr. 1, 2021).

41. See De Roover & Balagangadhara, *supra* note 36, at 524–25, 527, 531–32. But see STUART B. SCHWARTZ, *ALL CAN BE SAVED: RELIGIOUS TOLERANCE AND SALVATION IN THE IBERIAN ATLANTIC WORLD* 225–27, 248 (2008) (noting beliefs in toleration and liberty of conscience could be found all over in Spain, the Caribbean, and South America even though the ideas started out as purely Protestant).

42. BEJAN, *supra* note 24, at 167–68, 171–72.

43. See *supra* Introduction pp. at 285–87.

44. LABORDE, *supra* note 8, at 16–17.

45. See *id.*

“conscience,” and “nonconformity.” Political philosophers will debate how much “latitude” should be granted to “dissent”—and disagree about whether claims of conscience should be extended to matters that are, strictly speaking, “indifferent.”<sup>46</sup>

This early modern technical vocabulary reminds us that modern English is itself a product of the sixteenth and seventeenth centuries. But it also betrays the extent to which the language political theorists and philosophers use to describe the challenges of coexistence under conditions of religious diversity is itself the product of a particular ecclesiastical context—namely, that of an established church. Even today, our analytic concepts reflect those of the Church of England and its peculiar brand of Protestant episcopalianism, as an institution that debated for centuries how much “dissent” or disagreement it could accommodate within its communion while remaining a unified, properly public Church.<sup>47</sup>

## II. PAROCHIALISM AND ESTABLISHMENT

Elsewhere, I have noted the persistent conceptual *parochialism* of political theory when it comes to the challenges of coexistence under conditions of religious diversity.<sup>48</sup> Indeed, the term “parochial” is itself illustrative of the general process whereby Anglo-Catholic ideas and institutions were reappropriated and redeployed by the Tudor state after the Reformation. As a descriptive term, the adjective “parochial” means simply “of or belonging to the parish” as a unit of ecclesiastical, and later civil, governance.<sup>49</sup> Parishes developed in the Middle Ages as small territorial units organized around a single church and its minister. These units thus enjoyed a well-defined *geographic* and *administrative* place within the Anglo-Catholic ecclesiastical hierarchy. During the English Reformation, the Tudor monarchy effectively nationalized the existing parish systems in order to implement the Poor Law and other social policies.

Understanding the process whereby the newly “National,” as opposed to Catholic or universal, church assumed not only the

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46. Bejan, *supra* note 14.

47. *Id.*

48. *Id.*

49. *Id.*; *Parochial*, OXFORD ENGLISH DICTIONARY, [https://www-oed-com.rwulaw.idm.oclc.org/view/Entry/138040?redirectedFrom=parochial&\[https://perma.cc/G4J8-Q2QG\]](https://www-oed-com.rwulaw.idm.oclc.org/view/Entry/138040?redirectedFrom=parochial&[https://perma.cc/G4J8-Q2QG]) [(last visited Apr. 1, 2021)].

religious—but the administrative, educative, economic, and philanthropic—roles and resources of its Anglo-Catholic predecessor is crucial in making sense of how the issue of establishment presented itself to English Protestants in the seventeenth century—including the evangelicals like Roger Williams, who emigrated to the New World. Most of these refugees (including the more famous Pilgrims of Plymouth Rock) were also *Puritans*.<sup>50</sup> While many Americans will recognize “Puritan” today as a pejorative—if not from early American history, then from H.L. Mencken’s famous dictum<sup>51</sup>—few will understand the label’s origins. This name (or, in early modern English, “denomination”) was coined as a pejorative in the sixteenth century to describe Protestants within the newly Protestant Church of England who believed that the work of Reformation had not gone far enough.<sup>52</sup>

So-called “Puritans” could not help but notice the ease with which the Anglican Church had accommodated itself to Anglo-Catholic institutions—not only parishes, but episcopacy (that is, government by bishops), miters, surplices, kneeling, incense, and all the rest—and concluded that the English hierarchy had made premature peace with the Whore of Babylon (i.e., Roman Catholicism), thereby stopping the godly work of Reformation in its tracks.<sup>53</sup> Initially, these “Puritans”—while meeting occasionally in private prayer and scripture-reading groups called “conventicles”—were committed to remaining members of the Church of England so as to be able to reform it from within.<sup>54</sup> But over time, and under persecution, some Puritans formally separated from the National Church to form their own “dissenting” congregations.<sup>55</sup>

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50. MICHAEL P. WINSHIP, *HOT PROTESTANTS: THE HISTORY OF PURITANISM IN ENGLAND AND AMERICA* 71–82 (2018).

51. A Puritan, Mencken tells us, is someone dominated by the “fear that someone, somewhere, may be happy.” H. L. MENCKEN, *A MENCKEN CHRESTOMATHY* 624 (H.L. Mencken ed., First Vintage Books ed., 1982).

52. See COFFEY, *supra* note 27, at 93.

53. See *id.* at 93–94.

54. See KAPLAN, *supra* note 27, at 141.

55. See William Wallace Fenn, *John Robinson’s Farewell Address*, 13 *HARV. THEOLOGICAL REV.* 236, 239–40 (1920). One such congregation, led by John Robinson, fled abroad and settled in Leyden before deciding to remove wholesale to the New World. WINSHIP, *supra* note 50, at 62. Although their intended destination was Virginia, these so-called “Pilgrims” had to make do with Plymouth, Massachusetts when a violent storm blew their ship, the

Still, the majority of Puritans remained in England, determined to push the established Church towards the purity of “primitive” Christianity, from within. A renewed campaign of persecution—led by the unfortunate Charles I and his equally unfortunate Archbishop of Canterbury, William Laud—led to another wave of religious refugees (including Williams) in the 1630s. After this, however, those who stayed behind got their chance.<sup>56</sup> When the English Civil War broke out in 1642, almost the first item on the Long Parliament’s agenda was to abolish bishops (finally accomplished in 1646<sup>57</sup>) and “establish” a more godly form of Church-government in its place.<sup>58</sup> Here, however, the Puritans were themselves divided between Presbyterians, who wanted to impose Scottish discipline and unity on the English Church, and “Independents” or Congregationalists, who wanted individual churches to be able to organize themselves and choose their own ministers under the umbrella (and watchful eye) of the ecclesiastical establishment. Under the latter system, the National Church would act as a centralized regulatory body overseeing the training and ordination of clergy.<sup>59</sup> Unable to agree, the breakdown of negotiations between Presbyterians and Independents led to a *de facto* (albeit limited) toleration under Oliver Cromwell during the Interregnum.<sup>60</sup>

The episcopal Church of England—which still exists to this day—would be fully reestablished along with the monarchy in 1660,<sup>61</sup> after which it quickly got down to the business of cracking down on dissent. It pursued this persecutory program with the support of Parliament until the so-called “Toleration Act” of 1689

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Mayflower, off course. *See id.* at 71–72. For a first-hand account, see generally WILLIAM BRADFORD, *OF PLYMOUTH PLANTATION, 1620–1647* (Henry Wish ed., Capricorn Books 1962) (1912).

56. *See* RAKOVE, *supra* note 19, at 27.

57. Marcus Harmes, *The Universality of Discipline: Restoration of the English Episcopacy, 1660–1688*, 33 *RENAISSANCE & REFORM* 55, 59 (2010).

58. *See* COFFEY, *supra* note 27, at 135–36.

59. *See* RAKOVE, *supra* note 19, at 27.

60. *See* COFFEY, *supra* note 27, at 147–48; *cf.* Blair Worden, *Toleration and the Cromwellian Protectorate*, in *PERSECUTION AND TOLERATION* 199, 227 (W. J. Sheils ed., 1984) (during the close of the Interregnum, toleration was provided to some sects of “peaceable dissenters,” yet still it was still forbidden to blaspheme, particularly by espousing any anti-trinitarian doctrines).

61. RAKOVE, *supra* note 19, at 28.

broke its monopoly on public worship for good.<sup>62</sup> As Rakove notes, persecution by the re-established Church came in predominately two forms: penal laws and Test Acts.<sup>63</sup> The former imposed steep fines, and even imprisonment, for non-attendance at public worship, while also banning conventicles—defined as private religious meetings of over five persons beyond immediate family<sup>64</sup>—altogether.<sup>65</sup> Test Acts were designed, in turn, to exclude “nonconformists,” or those who would not take communion in an established church (above all, Catholics) or swear oaths (above all, Quakers) by imposing these as preconditions for participating in public office and in the courts.<sup>66</sup>

This was the legal regime and political context in which the question of religious toleration came to the forefront of public debate in England once again in the latter part of the seventeenth century. Proponents of toleration generally had two main policy options in view. The first, known as “indulgence,” proposed to repeal or suspend the penal laws punishing dissent, and thus accept (at least informally) the existence of multiple churches alongside the National Church.<sup>67</sup> The second, known as “comprehension” or “latitude,” was an *irenic* (literally, peace-seeking) policy that proposed to accommodate diversity within the established Church through creedal minimalism and sacramental inclusiveness.<sup>68</sup> By paring back theological orthodoxy on so-called “indifferent” matters (*adiaphora*) in favor of the “fundamentals” (*fundamenta*) of Christianity, those known as “latitudinarians” within the Church of England hoped to be able to welcome dissenters back into the fold.<sup>69</sup> Although it is largely forgotten today, the historian

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62. See SOWERBY, *supra* note 27, at 250.

63. RAKOVE, *supra* note 19, at 29.

64. RICHARD LODGE, 8 THE HISTORY OF ENGLAND: FROM THE RESTORATION TO THE DEATH OF WILLIAM III, 1660–1702, at 69 (1910).

65. RAKOVE, *supra* note 19, at 29.

66. See *id.* at 29–30.

67. See *id.* at 29–31.

68. See Mark Goldie, *John Locke, Jonas Proast, and Religious Toleration: 1688-1692*, in THE CHURCH OF ENGLAND: 1689–1833, 143, 160–61, 164 (John Walsh et al., eds., 1993); SOWERBY, *supra* note 27, at 58, 174–75.

69. See Mark Goldie, *The Theory of Religious Intolerance in Restoration England*, in FROM PERSECUTION TO TOLERATION: THE GLORIOUS REVOLUTION AND RELIGION IN ENGLAND 331, 332–33, 354 (Ole Peter Grell et al. eds., 1991); see also Goldie, *supra* note 69, at 161, 164.



Benjamin Kaplan argues that comprehension was thus “the most ambitious and charitable of all forms [of toleration], requiring a genuine acceptance of beliefs different from one’s own as valid and a willingness to take Holy Communion with those who maintained them.”<sup>70</sup>

Recognizing that there were two forms of toleration on offer in the seventeenth century complicates the familiar liberal story that recounts its ineluctable “rise.” Firstly, it reveals that the chief proponents of accommodating religious diversity outside of the established Church were not enlightened Whig statesmen in Parliament, but rather the absolutist, crypto-Catholic Stuart monarchs, Charles II and James II, both of whom issued “Declarations of Indulgence” over Parliament’s objection and canvassed for the repeal of its persecutory statutes.<sup>71</sup> Secondly, it reminds us that the Parliamentary Act of Toleration, enacted after James II was expelled and replaced by his daughter, Mary, and her safely Protestant husband, William of Orange, was rather a statutory *indulgence* and was meant to be accompanied by a complementary Act of Comprehension, which failed to pass.<sup>72</sup> Actually called “An Act for Exempting their Majestyes Protestant Subjects dissenting from the Church of England from the Penalties of certaine Lawes” (1688, enacted 1689), the Toleration Act suspended but did not repeal the penal laws prosecuting any religious activity by Trinitarian Protestants outside of the established Church.<sup>73</sup> Catholics, Quakers, and Unitarians would remain out of luck, and the Test Acts targeting them directly remained on the books well into the nineteenth century.<sup>74</sup>

Needless to say, *neither* form of toleration on offer in the seventeenth century proposed to disestablish the established Church of England, nor did dissenters argue that their liberty of

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70. KAPLAN, *supra* note 27, at 133.

71. See SOWERBY, *supra* note 27, at 24, 29, 58. James II also sponsored the colonial experiment in religious diversity known as Pennsylvania, conducted by his close friend (and Quaker) William Penn. See *id.* at 40.

72. *Id.* at 249–55.

73. See generally An Act for Exempting their Majestyes Protestant Subjects dissenting from the Church of England from the Penalties of certaine Lawes 1689, 1 W. & M. c. 18 (Eng.), <http://www.british-history.ac.uk/statutes-realm/vol6/pp74-76> [perma.cc/YMZ4-S9A7].

74. See KAPLAN, *supra* note 27, at 141.

conscience demanded disestablishment in the form of defunding the Church or abolishing its political, legal, economic, or symbolic privileges. Rather, both forms of toleration (indulgence as well as comprehension) *presupposed* the continued existence of an established Church. While the grounds on which religious uniformity and a National Church were defended as essential shifted over time—with secular concerns about the economic and geopolitical benefits of Protestant unity eventually overtaking salvific ones—eighteenth-century Whigs and Tories were generally agreed in viewing the Church of England as an important part of the English Constitution, although they disagreed on just how essential a part it was.<sup>75</sup> For example, in her 1704 pamphlet *Moderation Truly Stated*, the Tory polemicist and feminist Mary Astell inveighed against the practice of “Occasional Conformity”—whereby dissenters took occasional communion in the Church of England so as to be able to seek office—because it allowed hypocritical Whigs who were not true “Friends to the Constitution” to stand for public office.<sup>76</sup>

Certainly, there were many critics of the established Church of England as it existed after the Restoration, and these critics would grow louder over time.<sup>77</sup> In the late eighteenth century, Unitarian ministers and theologians like Richard Price (1723–1791) and Joseph Priestley (1733–1804) would begin to argue—with one eye on the American colonies—that coercive taxation in support of the religious establishment was itself a violation of dissenters’ liberty of conscience.<sup>78</sup> But those who criticized the episcopal establishment as bloated, as well as bigoted, were not generally motivated by conscience. For example, the inventor of “political

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75. See Mark Knights, ‘Meer Religion’ and the ‘church-state’ of Restoration England: the impact and ideology of James II’s declarations of indulgence, in *A NATION TRANSFORMED: ENGLAND AFTER THE RESTORATION* 41, 41–42 (Alan Craig Houston & Steve C. A. Pincus eds., 2001).

76. See MARY ASTELL, *MODERATION TRULY STATED*, at xlii (1704); see also Mark Goldie, *Mary Astell and John Locke*, in *MARY ASTELL: REASON, GENDER, FAITH* 65, 75 (William Kolbrener & Michal Michelson eds., 2007).

77. See generally J.A.I. CHAMPION, *THE PILLARS OF PRIESTCRAFT SHAKEN: THE CHURCH OF ENGLAND AND ITS ENEMIES, 1660–1730* (1992).

78. See generally JOSEPH PRIESTLEY, *AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT AND ON THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY* (2d ed. 1771); RICHARD PRICE, *OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA* (9th ed. 1776).

arithmetic,” Sir William Petty (1623–1687) argued that the clergy should be saddled with additional duties—including census-taking, maintaining public records, acting as notaries, inspecting schools, and delivering the post—in order to justify their cost.<sup>79</sup> Beyond overseeing public worship and maintaining church buildings, the Church of England would remain responsible for overseeing much of public education and poor relief in England well into the nineteenth century.<sup>80</sup> And even as their influence and enforcement in the political sphere waned, religious tests remained in force in British Universities, which continued to operate as they had for centuries, as key credentialing bodies for the Anglican clergy.<sup>81</sup> Nevertheless, dissenters did not seek to defund the Universities, but rather founded their own Dissenting Academies.<sup>82</sup>

With this thoroughly establishmentarian context in mind, let us turn now to the seventeenth-century thinkers still claimed today as founding figures in America’s tradition of secular liberalism and consider how they viewed the issue of establishment. As we shall see, the arguments offered by Roger Williams and John Locke differed greatly; neither were what modern liberals might expect.

### III. THE LATRINE OF NEW ENGLAND

Given their continuing fascination with early modern toleration debates, political theorists’ comparative lack of interest in the early American experiments with religious coexistence conducted by erstwhile dissenters from the Anglican Church like Roger Williams and William Penn is surprising. For example, Rainer Forst’s magisterial tome, *Toleration in Conflict*, runs over 600 pages and surveys such relatively obscure figures in the history of toleration as Raymond Lull *en route* to Rawls, but barely

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79. See 1 WILLIAM PETTY, THE PETTY PAPERS 141–43 (Henry Petty-Fitzmaurice ed., 1927). I am grateful to Shannon Stimson for bringing Petty’s complaints to my attention. See generally Shannon Stimson, Heterodoxy and Political Economy in Sir William Petty (unpublished manuscript) (on file with the author).

80. See James Murphy, *Religion, the State, and Education in England*, 8 HIST. EDUC. Q. 3, 8–10, 28 (1968).

81. See *id.* at 28.

82. See IRENE PARKER, DISSENTING ACADEMIES IN ENGLAND: THEIR RISE AND PROGRESS AND THEIR PLACE AMONG THE EDUCATIONAL SYSTEMS OF THE COUNTRY 46–50 (1914).

considers the “lively experiments” conducted in Rhode Island and Pennsylvania.<sup>83</sup>

Nevertheless, the role played by English dissenters in the colonies of British North America has long loomed large in the self-understanding of Americans.<sup>84</sup> In 1835, Alexis de Tocqueville famously claimed to “see the destiny of America imbodyed in the first puritan who landed on those shores, just as the human race was represented by the first man.”<sup>85</sup> Yet in crediting the Pilgrims of Plymouth Colony as the “Founders” of American democracy, Tocqueville was repurposing a popular domestic trope for an international audience.<sup>86</sup> As described by the historian Sarah Morgan Smith in honor of its 400th anniversary, the Mayflower Compact (1620)—signed by the Puritan separatists attempting to emigrate, unsuccessfully, from Holland to Virginia, as well as the non-Puritan “strangers” in their midst—marked the arrival of “the principle of religious toleration in America.”<sup>87</sup>

Of course, the cultural emphasis on the Pilgrims and the other “Christian Utopian Closed Corporate Communit[ies]” of Puritans that came to New England and settled in their wake, neglects the English colonists who came before them.<sup>88</sup> Indeed, by the time the

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83. See generally RAINER FORST, *TOLERATION IN CONFLICT* (2013). When Forst discusses Williams and Penn, it is exclusively in their English contexts. Teresa M. Bejan, *What's the use? Rainer Forst and the history of toleration*, in *TOLERATION, POWER AND THE RIGHT TO JUSTIFICATION: RAINER FORST IN DIALOGUE* 23, 33–34 (Daniel Owen ed., 2020); see FORST, *supra*, at 182–85, 206–08.

84. See generally BERNARD BAILYN, *THE BARBAROUS YEARS: THE PEOPLING OF BRITISH NORTH AMERICA: THE CONFLICT OF CIVILIZATIONS, 1600–1675* (2012).

85. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 318 (Henry Reeve trans., 4th ed. 1841).

86. See Sanford Kessler, *Tocqueville's Puritans: Christianity and the American Founding*, 54 *J. POL.* 776, 789–91 (1992); cf. Rufus Choate, *The Age of the Pilgrims: The Heroic Period of our History*, Address to the New England Association (1843), in 1 *THE NEW ENGLAND SOCIETY ORATIONS* 325, 325–26 (Cephas Brainerd & Eveline Warner Brainerd eds., 1901) (asserting that Americans are “the children of the Pilgrims”).

87. Sarah Morgan Smith, *To Covenant and Combine Ourselves into a Civil Body Politic: The Mayflower Compact @ 400 Years*, *ONLINE LIBRARY OF LIBERTY* (May 2020), <https://oll.libertyfund.org/pages/lm-smith-1620> [<https://perma.cc/UQ2W-LRAR>].

88. Cf. KENNETH A. LOCKRIDGE, *A NEW ENGLAND TOWN THE FIRST HUNDRED YEARS: DEDHAM, MASSACHUSETTS, 1636–1736*, at 16–17, 165 (1970)

Pilgrims arrived in Plymouth, the episcopal Church of England had already been established in Virginia.<sup>89</sup> While the ill-fated Roanoke Colony had disappeared by 1590, Jamestown limped along from 1607.<sup>90</sup> The contemporary Popham Colony in Maine packed up after only a year.<sup>91</sup> Nor were the Pilgrims the first English settlers to be blown off course. The 1609 shipwreck that inspired Shakespeare's *Tempest* led to the settlement of Bermuda or "Somers Isles" by English sailors.<sup>92</sup> In 1612, the Bermudans even signed a "compact" of their own, before the third and final Virginia Charter brought the islands formally under Company control.<sup>93</sup> This "Bermuda Compact," if you will, began by declaring subscribers' fidelity to the Church of England and hostility to its "dissenting" enemies: "all Atheists[,] Papists, Anabaptists, Brownists"—i.e., separatist congregationalists like the Pilgrims themselves—"and all other Heretiques and Sectaries whatsoever, dissenting from the said [Anglican] Word and Faith."<sup>94</sup>

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(focusing on puritan origins of a New England town and casting its history as illustrative of "much of early America").

89. William H. Seiler, *The Church of England as the Established Church in Seventeenth-Century Virginia*, 15 J. SOUTHERN HIST. 478, 482 (1949).

90. See generally KATHLEEN DONEGAN, SEASONS OF MISERY: CATASTROPHE AND COLONIAL SETTLEMENT IN EARLY AMERICA, 21–116 (2014).

91. Christopher J. Bilodeau, *The Paradox of Sagadahoc: The Popham Colony, 1607–1608*, 12 EARLY AM. STUD. 1, 1 (2014).

92. Charles Frey, *The Tempest and the New World*, 30 Shakespeare Q. 29, 29 (1979) (examining the influence of new world settlement on Shakespeare's play); J. Maxwell Greene, *Bermuda (alias Somers Islands). Historical Sketch*, 33 BULL. AM. GEOGRAPHICAL SOC'Y 220, 223–26 (1901) (charting early English settlement of Bermuda).

93. J.S. MALOY, THE COLONIAL AMERICAN ORIGINS OF MODERN DEMOCRATIC THOUGHT 90 (2008).

94. SILVESTER JOURDAIN, A PLAINE DESCRIPTION OF THE BARMVDAS, NOW CALLED SOMMER ILANDS 23 (1613) (spelling modernized). The second article pledged to keep the Sabbath holy, and the third turned to political matters as emphatically secondary to spiritual. *Id.* The Bermudans pledged to "li[v]e together in doing that which is [j]ust, both towards God and Man . . . and to avoide [sic] all things that stand not with the good estate of a Christian Church and well go[v]erned Commonwealth." *Id.* at 23–24. Jourdain, a merchant, was among the sailors shipwrecked in 1609. Teresa M. Bejan, *The 1612 Project*, at n.7, ONLINE LIBRARY OF LIBERTY (May 27, 2020), [https://oll.libertyfund.org/page/lm-smith-1620#lm-smith-1620\\_footnote\\_r3\\_06\\_ref](https://oll.libertyfund.org/page/lm-smith-1620#lm-smith-1620_footnote_r3_06_ref) [<https://perma.cc/8J5H-ZVLT#response3>]. This pamphlet reprinted his earlier narrative, *A Discovery of the Barmudas*, along with supplementary material (including the text of the Bermuda Agreement as an appendix), the authorship of which is

Nor, apart from those in Plymouth and Salem, were the Puritan churches founded in New England actually independent. Rather, their removal to the New World saved Puritan immigrants the trouble of making a formal separation from the Church of England, thus allowing for a kind of “comprehension” at a distance. Members of the Boston Church, for instance, remained communicants in the Church of England, and so could and would attend their parish churches when back in Old World.<sup>95</sup> As this arrangement attests, transatlantic traffic (including repeat voyages) was more common in the seventeenth century than modern observers often realize. It was the continued imbrication of the Boston Church with the episcopal establishment back home that ultimately catapulted an obscure Puritan minister, Roger Williams, on his colonial adventures. Indeed, the failure of the New English churches on the whole to separate served as a crucial negative exemplar when Williams came to “establish” his own colony and its institutions.

The story of Williams’s banishment from Massachusetts Bay is fairly well known.<sup>96</sup> Like many Puritans, Williams left England in the 1630s not only because he wanted to flee the rising tide of persecution with the Church of England under Archbishop Laud, but because he had had enough of living in a society of sinners and wanted to try a society of “saints.”<sup>97</sup> Inspired by the Puritan lawyer and first Governor of Massachusetts Bay, John Winthrop, Williams believed that Boston would prove to be a “city on a hill,” in which the righteous might live among the like-minded as models of Christian charity to the “unregenerate.”<sup>98</sup> But Williams was soon

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uncertain. *Id.* at n.7. For a more detailed discussion of the Bermuda Agreement compared with the Mayflower Compact, see *id.*

95. See *The Road to Banishment*, in 1 *THE CORRESPONDENCE OF ROGER WILLIAMS: 1629–1653*, at 12, (Glenn W. LaFantasie ed., 1988) (editorial note).

96. See generally PERRY MILLER, *ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION* (1963). For a more recent and detailed account, see generally BARRY, *supra* note 22.

97. See CHUPACK, *supra* note 28, at 38–41; see also EDMUND S. MORGAN, *VISIBLE SAINTS: THE HISTORY OF A PURITAN IDEA* 113 (1963) (“The English emigrants to New England were the first Puritans to restrict membership in the church to visible saints, to persons, that is, who had felt the stirrings of grace in their souls . . .”).

98. See CHUPACK, *supra* note 28, *preface* (unpaginated); see also John Winthrop, *A Modell of Christian Charity* (1630), in 7 *COLLECTIONS OF THE*

disappointed. Upon his arrival in 1631, he refused to take a position as teacher in the Boston Church when he realized that it was still formally unseparated from the Church of England.<sup>99</sup> Things went downhill from there.

As Williams settled down in Massachusetts Bay, he turned his gift for learning languages to mastering the local Algonquin dialects to aid his independent missionary efforts among the local tribes.<sup>100</sup> Through his “American” associates, Williams began to see the “unchristian Christians” of New England as hypocrites, ostentatiously crying out against others’ sins, while living on land that they had stolen from the natives in the name of Christianity—a ruse Williams saw as worthy of the Anti-Christ (i.e., the Pope) himself.<sup>101</sup>

According to his contemporaries, Williams’s radical views on Native American land rights were not his only “offensive” opinions.<sup>102</sup> In addition to floating the suggestion that women should wear veils (in keeping with St. Paul’s counsel in 1 Cor. 11:6), his Separatist preaching apparently led supporters to deface an English flag by cutting out the cross of St. George.<sup>103</sup> Cotton Mather would later claim that Williams had once “insisted vehemently upon the unlawfulness of calling any *unregenerate* man by the name of *good-man such an one*,” as was the Puritan

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MASSACHUSETTS HISTORICAL SOCIETY 32, 47 (3d ser. 1838) (“[W]ee shall be as a citty upon a hill.”).

99. *The Road to Banishment*, *supra* note 95, at 12–13.

100. See generally Teresa M. Bejan, ‘When the Word of the Lord Runs Freely’: Roger Williams and Evangelical Toleration, in *THE LIVELY EXPERIMENT: THE STORY OF RELIGIOUS TOLERATION IN AMERICA, FROM ROGER WILLIAMS TO THE PRESENT* 65 (Chris Beneke & Christopher S. Grenda eds., 2015).

101. See ROGER WILLIAMS, *CHRISTENINGS MAKE NOT CHRISTIANS* (1645), reprinted in 14 *RHODE ISLAND HISTORICAL TRACTS* 8–14 (Henry Martin Dexter ed., 1881). The earlier pamphlet in which he apparently circulated this claim in Boston has been lost.

102. Cf. ROGER WILLIAMS, *A KEY INTO THE LANGUAGE OF AMERICA* 143 (R.I. & Providence Plantations Tercentenary Comm. 5th ed. 1936) (1643) (in contrast to the perceived innocence of the local Native American tribes, Williams accused the English of being particularly sinful, charging that “although they have not so much to restraine them (both in respect to knowledge of God and the Lawes of men) as the *English* have, yet a man shall never heare [sic] of such crimes amongst them of robberies, murders [sic], [and] adulteries as amongst . . . the *English*”).

103. *The Road to Banishment*, *supra* note 95, at 16–17.

custom.<sup>104</sup> Like his opposition to the English flag or its colonial charter, this seemingly silly objection to polite modes of address reflected Williams's increasing concern about the conflation of "civil" and "spiritual" matters and powers in Massachusetts Bay. Much like the Quakers would later, he saw the colony's use of civil oaths (e.g., of allegiance or in court proceedings) as a form of compulsory religious worship in the service of the state, as well.<sup>105</sup>

All of this is to say that Roger Williams was, in the end, *too Puritan for his fellow Puritans*. To the relief of parties on both sides, he soon left Boston for the formally separated congregation at Salem.<sup>106</sup> But even then, Williams upheld what he saw as his non-negotiable duty as a properly *evangelical* Christian to continue to preach and publish against his Boston brethren's errors.<sup>107</sup> Finally, in 1635, the government of Massachusetts took the extraordinary step of banishing Williams back to England<sup>108</sup>—at the instigation, he believed, of John Cotton, another minister of the Boston Church recently arrived from England.<sup>109</sup> Williams carried his grudge against Cotton with him into exile in the New England wilderness, where he went in an effort to escape his sentence of deportation.<sup>110</sup> The "wall of separation" phrase for which Williams would later become famous originated in his public response to Cotton's private letter justifying his banishment, published in London as *Mr. Cotton's Letter Lately Printed, Examined and Answered by Roger Williams of Providence* in 1644.<sup>111</sup> He would

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104. 1 THE CORRESPONDENCE OF ROGER WILLIAMS, *supra* note 95, at 9 n.3 (quoting COTTON MATHER, 1 MAGNALIA CRISTI AMERICANA 117 (Silas Andrus 1820) (1702)).

105. See Jimmy D. Neff, *Roger Williams: Pious Puritan and Strict Separationist*, 38 J. CHURCH & ST. 529, 534 (1996).

106. *The Road the Banishment*, *supra* note 95, at 13–14.

107. See *id.* at 14–21; see also Linford D. Fisher, *Evangelicals and Unevangelicals: The Contested History of a Word, 1500–1950*, 26 RELIGION & AM. CULTURE 184, 192–94 (2016) (examining the term "evangelical" as a connotation of true faith and noting its use during the colonial period in New England).

108. *The Road to Banishment*, *supra* note 95, at 21.

109. *Letter from John Cotton*, in 1 THE CORRESPONDENCE OF ROGER WILLIAMS, *supra* note 95, at 31–32 (editorial note).

110. See *id.*

111. CHUPACK, *supra* note 28, at 72; ROGER WILLIAMS, MR. COTTON'S LETTER LATELY PRINTED, EXAMINED, AND ANSWERED (1644), *reprinted in* ON RELIGIOUS LIBERTY 46, 70 (James Calvin Davis ed., 2008). Williams denied that he was



continue his public campaign against Cotton at considerably greater length in his pro-toleration treatise, *The Bloody Tenent of Persecution*.<sup>112</sup>

According to his own account, Williams received the land that would become Providence as a gift from the Narragansett Chief Canonicus after a hard winter's exile among the Wampanoag.<sup>113</sup> It is not clear that he intended to found a colony of his own, let alone a tolerant one. Rather, the founding of "Rhode Island and Providence Plantations" seems to have been an accident. Williams did not set out to lead; nevertheless, he was followed—mainly by other religious troublemakers and exiles like Anne Hutchinson and Samuel Gorton, both of whom later joined his plantation, much to Williams's chagrin.<sup>114</sup> To say that the success of the experiment with toleration in Rhode Island was not a foregone conclusion is an understatement. Neighbors in New Amsterdam complained that Williams's colony had become the "receptacle for all sorts of riff-raff people . . . nothing else than the sewer, (latrina) of New England."<sup>115</sup>

That "latrine" was also, for a time, the most tolerant society the Christian world had ever seen.<sup>116</sup> Rhode Island welcomed Protestants of all stripes, as well as Jews, Muslims (at least in theory), American "pagans," and even Catholic "Anti-Christians" to come and live together on terms of equal liberty, including the liberty to proselytize for their respective faiths.<sup>117</sup> Still, its most

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the means by which Mr. Cotton's letter found its way into print in London, but no one believed him. *Letter from John Cotton*, *supra* note 109, at 32. Jeremy Waldron has argued that the phrase "wall of separation" originated with the Anglican theologian Richard Hooker, but there are reasons to doubt it. WALDRON, *supra* note 24, at 208; cf. BEJAN, *supra* note 24, at 199.

112. CHUPACK, *supra* note 28, at 85–86.

113. See Jack L. Davis, *Williams Among the Narragansett Indians*, 43 *NEW ENG. Q.* 593, 598 (1970); WILLIAMS, *supra* note 111, at 33.

114. See CHUPACK, *supra* note 28, at 40–41.

115. See 14 *DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK: ONE HUNDRED AND TWENTY-FIFTH SESSION* 400 (1902).

116. Fittingly, in the Middle Ages *tolerantia* was understood as a policy of permission without approval of an acknowledged, including raw sewage. See generally István Bejczy, *Tolerantia: A Medieval Concept*, 58 *J. HIST. IDEAS* 365 (1997).

117. ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION* (1645), reprinted in *ON RELIGIOUS LIBERTY*, *supra* note 111, at 87, 135; see BEJAN, *supra* note 24, at 50–79.

remarkable feature was the entire absence of an established church of any denomination in Williams's colony—what Charles II called its “livelie experiment,” to be repeated forty years later by Penn and James II.<sup>118</sup> We are now also in a position to recognize the situation in Rhode Island (and later in Pennsylvania) as one not of *dis*-establishment, but rather *non*-establishment, in Laborde's phrase.<sup>119</sup> Williams certainly had the opportunity to entrench the religion of his choosing in his colony upon his arrival or in its original 1644 Parliamentary patent, secured upon his first return to London.<sup>120</sup> And yet, he did not.

The fact is clear enough. But what of Williams's theoretical principles? Commentators usually see in Rhode Island's non-establishment simply the logical conclusion of Williams' separationist views. Yet the distinction between “civil” and “spiritual” government was, by the seventeenth century, a Calvinist commonplace. Even in theocratic Geneva itself, reformed Protestants had been careful to respect the formal distinction between the civil office and authority exercised by the city magistrates from the spiritual authority wielded by elders of the Church.<sup>121</sup> Nor does non-establishment appear to have been a straightforward consequence of Williams's commitment to the liberty of conscience. He had little patience for those who, like the Quakers, would plead conscience to avoid “pay[ing] their freight”—i.e., taxes—whenever the “commander of the ship [of state]” deemed it necessary for their “justice, peace, and sobriety.”<sup>122</sup>

Rather, Williams's chief concern remained, as always, to ward off the spiritual “pollution” that came from mixing religion and politics, just as Bostonians worshipping in their parish churches in England brought the contagion of Catholic “Anti-Christianity” back with them. It is well-known among jurists that Williams's purpose

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118. *Charter of Rhode Island and Providence Plantations - July 15, 1663*, LILLIAN GOLDMAN LAW LIBRARY, [https://avalon.law.yale.edu/17th\\_century/ri04.asp](https://avalon.law.yale.edu/17th_century/ri04.asp) [perma.cc/LR6R-32V6] (last visited Apr. 2, 2021); see also Sally Schwartz, *William Penn and the Toleration: Foundations of Colonial Pennsylvania*, 50 *J. MID-ATLANTIC STUD.* 284, 284–86 (1983).

119. See LABORDE, *supra* note 8, at 71–72.

120. See CHUPACK, *supra* note 28, at 59.

121. See generally PHILIP S. GORSKI, *THE DISCIPLINARY REVOLUTION: CALVINISM AND THE RISE OF THE STATE IN EARLY MODERN EUROPE* (2003).

122. Letter from Roger Williams to the Town of Providence (Jan. 1655) (Ship of State Letter), in *ON RELIGIOUS LIBERTY*, *supra* note 111, at 278, 279.

in restoring “the hedge or wall of separation between the Garden of the church and the wilderness of the world” was to keep the garden safe—i.e., to protect religion from the corrupting effects of politics.<sup>123</sup> Still, the finer points of Williams’s argument are often lost when considered apart from the thoroughly establishmentarian context in which they were made.

When Williams arrived back in London in 1644 to seek a patent for his fledgling colony, he found himself in the midst of a Civil War. The hated episcopal hierarchy was under attack, and the Long Parliament had convened a special commission of theologians—the Westminster Assembly of Divines—to discuss a new form of government for the National Church.<sup>124</sup> In his follow-up to *Mr. Cottons Letter Lately Printed*, Williams published his *Queries of Highest Consideration*, addressed to Parliament as well as to Presbyterian and Independent factions within the Assembly.<sup>125</sup> In this brief pamphlet, Williams reassured Parliament that:

[C]oncerning souls, we will not (as most do) charge you with the loads of all the souls in England, Scotland, [and] Ireland. We shall humbly affirm and (by the help of Christ) maintain that the bodies and goods of the subject [are] your charge [but] their souls (and yours) are set on account to [others].<sup>126</sup>

Here, we catch a glimpse of the social contract theory that Williams later made explicit in *The Bloody Tenent*, which grounded political power in “the people’s choice and free consent,” and consequently limited its exercise to “the common-wealth or safety of such a people in their bodies and goods.”<sup>127</sup>

But Williams’s case against establishment was for the most part theological, as well as historical. In freeing Parliament from the care of subjects’ souls, he reminded them of the utter hash previous governments had made of it, “what setting up, pulling

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123. *E.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 48–53; *see* WILLIAMS, *supra* note 111, at 70 (separation of the mundane and divine ensured the garden would “be walled . . . from the world”).

124. ROBERT ASHTON, THE ENGLISH CIVIL WAR: CONSERVATISM AND REVOLUTION, 1603–1649, at 218–19 (1978).

125. *See* Roger Williams, *Queries of Highest Consideration*, in ON RELIGIOUS LIBERTY, *supra* note 111, at 73.

126. *Id.* at 75.

127. WILLIAMS, *supra* note 117, at 148.

down, what formings, reformings, and again deformings” had reigned ecclesiastically in England over the past century, by which “[t]he fathers made the children heretics, and the children the fathers.”<sup>128</sup> Not only did this suggest that civil magistrates lacked privileged access when it came to religious truth, to put it mildly, it also suggested that a puritan Parliament should be glad to free itself of the spiritual “[s]upremacy . . . [o]f which power King Henry, upon a grudge (as ‘tis said) about his wife, despoiled the pope and with consent and act of Parliament sat down himself in the pope’s chair in England.”<sup>129</sup> Moreover, Williams argued, in insisting upon retaining that power, Presbyterians and Independents within the Westminster Assembly were alike attempting “a reviving of Moses, and the sanctifying of a new Land of Canaan, of which we hear nothing in the Testament of Christ Jesus.”<sup>130</sup>

Here, we see clearly the same charge of unwholesome Hebraizing that Williams would level at Cotton and other “unchristian Christians” of New England.<sup>131</sup> To speak at all of a “national” church, sounded to Williams’s ears like a denial of Christ’s coming, whereby the old covenant of Israel had given way to the new covenant of universal grace.<sup>132</sup> This denial would swiftly bring persecution in its train:

[How could] the constitution of a national church . . . possibly be framed without a racking and tormenting of the souls, as well as of the bodies, of persons. For it seems not possible to fit it to every conscience; sooner shall one suit of apparel fit every body [sic], one law [preside over] every case, or one size . . . every foot!<sup>133</sup>

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128. Williams, *supra* note 126, at 75, 77.

129. *Id.*

130. *Id.* at 77.

131. See WILLIAMS, *supra* note 102, at 8–14. For the popularity of “Hebraic” political theorizing in this period, see generally ERIC NELSON, *THE HEBREW REPUBLIC: JEWISH SOURCES AND THE TRANSFORMATION OF EUROPEAN POLITICAL THOUGHT* (2010).

132. Williams, *supra* note 125, at 78–79.

133. *Id.*

One recognizes here the boggling mind of a man practically acquainted with the religious diversity of his own colonial backwater.

When it came to the matter of state funding for religion, in particular, Williams was concerned less about conscience than corruption. In inveighing against so-called “hirelings”—that is, religious ministers trained and employed by the state—Williams was in good company with his friend, John Milton, who likewise detailed the distorting effects of government pay and discipline on those ostensibly committed to religious truth.<sup>134</sup> Forced to return to London in 1652 in search of second colonial patent (the first being made void by Charles I’s decapitation), Williams once more embroiled himself in the ecclesiastical controversies of his homeland.<sup>135</sup> In *The Hireling Ministry None of Christ’s*, Williams objected to the proposed reintroduction of tithes by the English Commonwealth on the grounds that a state-supported ministry encouraged ministers to “mak[e] a trade of preaching” and render “the cure of souls and the charge of men’s eternal welfare . . . a maintenance and living,” which was necessarily unchristian and corrupting.<sup>136</sup> The Gospel had been given by God to mankind in general, and should be *freely* given by Christians to those who had not yet been saved, in turn. Moreover, the public Universities charged with training and ordaining this ministry of servile hypocrites simply encouraged them in a “monkish and idle course of life, partly so genteel and stately, partly so vain and superstitious, that to wet a finger in any pains or labor is a disgraceful and unworthy act.”<sup>137</sup>

As a Cambridge graduate himself, Williams maintained that he was a lover of humane learning for its own sake; nevertheless, he insisted that the “sacrilegious and superstitious degrees (as they call them) in the profession of divinity” granted by Universities simply encouraged the hireling ministry in its Pharisaical

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134. See JOHN MILTON, AREOPAGITICA 23 (Global Grey 2018) (1644) (“I hate a pupil teacher, I endure not an instructor that comes to me under the wardship of an overseeing fist.”).

135. See Edward J. Eberle, *Roger Williams’ Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 436 (1999).

136. ROGER WILLIAMS, THE HIRELING MINISTRY NONE OF CHRIST’S (1652), reprinted in ON RELIGIOUS LIBERTY, *supra* note 111, at 249, 254.

137. *Id.* at 254–55.

pretenses.<sup>138</sup> In attacking the Universities in this way, Williams was taking aim squarely at the best means currently available to Cromwell and the Commonwealth (given the collapse of the Westminster Assembly's negotiations years before<sup>139</sup>) of maintaining the state's authority and discipline over the clergy through a regime of licensing and regulation. In 1652, Williams also published his objections to the so-called *Humble Proposals* presented to the Rump Parliament by the Independent minister John Owen.<sup>140</sup> Owen had been inspired, in part, by John Cotton's 1644 account of the New England way in *The Keyes to the Kingdom of Heaven and the Power thereof according to the Word of God*.<sup>141</sup> Williams was evidently not the only New Englander hoping to influence the settlement of ecclesiastical affairs in his homeland.

In his critique of *the Humble Proposals*, Williams objected specifically to Owen's proposed process of civil "approval," regulation, and state-licensing for preachers, as well as the supplementary system of "Triers and Ejectors" meant to discipline the Universities that trained ministers by expelling the heterodox.<sup>142</sup> Again, Williams insisted that the propagation of the Gospel was a duty of all Christians; hence any effort by the state to restrict "mechanic" preaching—that is, *ex tempore* preaching by

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138. *Id.* at 255.

139. See David Plant, *The Westminster Assembly*, BCW PROJECT (Feb. 22, 2009), <http://bcw-project.org/church-and-state/first-civil-war/westminster-assembly> [perma.cc/9PPG-2FZV].

140. Carolyn Polizzotto, *The Campaign against The Humble Proposals of 1652*, 38 J. ECCLESIASTICAL HIST. 569, 569 (1987); For more on Owen, see generally Manfred Svensson, *John Owen and John Locke: confessionalism, doctrinal minimalism, and toleration*, 43 HIST. EUROPEAN IDEAS 302 (2016).

141. See Joel R. Beeke & Randall J. Pederson, *John Owen: Excerpt from Meet the Puritans*, MONERGISM, <https://www.monergism.com/thethreshold/articles/onsite/meetthepuritans/johnowen.html> [perma.cc/5PRY-PRT7] (last visited Apr. 1, 2021).

142. See BEJAN, *supra* note 24, at 78; see also JEFFREY R. COLLINS, *THE ALLEGIANCE OF THOMAS HOBBS 167–69* (2005) (describing the functions of the "Triers and Ejectors" as a tool for "suppressing political dissent"); Jeffrey R. Collins, *The Church Settlement of Oliver Cromwell*, 87 HISTORY 18, 38–40 (2002) (arguing that the state church under Cromwell should not be seen as part of the "nascent tolerationist and pluralist" thought budding elsewhere in religious debate).

those without a University education—was an unacceptable restriction of their evangelical liberty.<sup>143</sup>

In these later pamphlets, Williams's complete theory of ecclesiastical *deregulation* as a requirement of true Christianity comes more fully into view. Individual Christians must be free to preach and propagate the Gospel, to associate freely with others to that end, and to elect and employ their own ministers, in turn, without fear or favor from either the state or any other church. This platform of de-regulation will be familiar to modern Americans as a "free market" in religion of the kind imagined by James Madison, under the influence perhaps of American Baptists like Isaac Backus, one in which rival churches could compete for converts like firms for customers.<sup>144</sup>

The association is strengthened when one considers Williams's famous definition of a church in *The Bloody Tenent*, as a "company of worshippers . . . like [unto] a corporation, society, or company of East India or Turk[ey] merchants, or any other society or company in London."<sup>145</sup> Williams elaborated:

These companies may hold their courts, keep their records, hold disputations, and in matters concerning their society may dissent, divide, break into schisms and factions, sue and implead each other at the law, yea wholly break up and dissolve into pieces . . . and yet the peace of the city not be in the least measure impaired or disturbed—because the essence or being of the city . . . is essentially distinct from those particular societies, the city-courts, city-laws, city-punishments distinct from theirs. The city was before them and stands absolute and entire when such a corporation or society is taken down.<sup>146</sup>

In this passage, one hears the echo of Williams's childhood in London as the son of a merchant-tailor. One also hears the voice of a man grateful that the city of Providence had yet withstood the sectarian impulses of its citizens, including Williams himself.

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143. See W. CLARK GILPIN, *THE MILLENARIAN PIETY OF ROGER WILLIAMS* 84 (1979).

144. See COFFEY, *supra* note 27, at 208; see generally RAKOVE, *supra* note 19.

145. WILLIAMS, *supra* note 117, at 98.

146. *Id.*

But when it comes to the theory of religious association behind Williams's definition of a church, these practical and economic experiences gave way to his emphatically evangelical and sectarian vision of Protestant Christianity. Williams's market metaphor denied the long-standing "corporal" conception of the church as the body of Christ, common to both Catholics and Protestants, in favor of a "corporate" one that clearly presupposed the supremacy of *civil law and courts* over church governance, as well as the *lay and local control* of congregations as registered corporations, instead of that of an ordained ministry and national (or international) hierarchy.<sup>147</sup> Both features of Williams's definition would have been anathema to most seventeenth-century Protestants, who expected ministers to be "bred" at Oxford or Cambridge,<sup>148</sup> as Williams himself had been.<sup>149</sup> But of course, Williams never joined a Protestant church he could not (and did not) leave in a hurry—including the first Baptist congregation in New England.<sup>150</sup> Offending his fellow Christians came naturally.

If asked, then, whether America is a Christian nation today, Williams would answer—"no." Nations were, for him, by definition fallen communities that brought regenerate and unregenerate Christians together, along with non-Christian "infidels," in a single ship of state. For one "must go out of the world, in case we may not keep company in civil converse with idolaters."<sup>151</sup> One must be careful, then, not to conflate the boundaries and standards of membership between the "wilderness" of the worldly city and the "garden" of the true church. The former should be governed by the standard of "mere civility" in this lifetime, the latter by "spiritual goodness" and truly Christian charity in this and in the life to come.<sup>152</sup>

Still, a supreme irony remains: in failing to establish a church in Providence, Roger Williams inadvertently established his own evangelical and sectarian religion. Insofar as the First Amendment enacted this distinctly American vision of church-state relations on

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147. RAKOVE, *supra* note 19, at 116–17.

148. See MURPHY, *supra* note 80, at 6–8.

149. CHUPACK, *supra* note 28, at 29.

150. See *id.* at 64.

151. ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION* 116 (Samuel L. Caldwell ed., Narragansett Club 1867) (1644) (spelling modernized).

152. See BEJAN, *supra* note 24, 50–81.



the national level, its critics are right to point out that its effect is not one of *dis-establishment* at all, but rather of the *inadvertent establishment of evangelical Protestantism* as a matter of law, an establishment to which we do, indeed, still expect all other religions and churches to conform. As Rakove points out, American law in the nineteenth century developed in a de-regulatory direction which treated churches as corporations in precisely Williams' sense, so that even the Catholic church was forced to accommodate itself to local incorporation and lay control.<sup>153</sup>

#### IV. LOCKE'S LAST STAND

Where does this leave John Locke? Scholars sometimes read Locke's 1689 *Letter Concerning Toleration* as though it were a blessedly abbreviated and less overtly scriptural second draft of Williams's *Bloudy Tenent*.<sup>154</sup> This push to acknowledge his predecessors is, in part, the result of a concerted revisionist effort by historians to counteract the "Locke Obsession" that has long dominated histories of toleration and liberalism.<sup>155</sup> Rakove describes the *Letter* "as a postscript to a debate that had largely run its course."<sup>156</sup>

Recently, however, the political theorist Andrew Murphy has argued that originality is overrated as a virtue of political thinkers in any case, whether in the case of Locke or William Penn.<sup>157</sup> The former certainly brought theoretical clarity and practical precision, if not wit, to the arguments others had made before him, thereby creating the commonsensical case for toleration for generations of

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153. RAKOVE, *supra* note 19, at 117; *see generally* Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 308–12 (2014); Sarah Barringer Gordon, *Religious Corporations and Disestablishment 1780–1840*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 63 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

154. *See* EDWIN S. GAUSTAD, *LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA* 196 (1991).

155. John Christian Laursen & Cary J. Nederman, *Introduction to BEYOND THE PERSECUTING SOCIETY: RELIGIOUS TOLERATION BEFORE THE ENLIGHTENMENT* 1, 2–3 (John Christian Laursen & Cary J. Nederman eds., 1998).

156. RAKOVE, *supra* note 19, at 34.

157. ANDREW R. MURPHY, *LIBERTY, CONSCIENCE, AND TOLERATION: THE POLITICAL THOUGHT OF WILLIAM PENN* 81 (2016).

liberal political theorists to come.<sup>158</sup> Locke certainly exercised a more direct influence on the First Amendment than Roger Williams ever did. This occurred through the medium of Madison's close friend and colleague, Thomas Jefferson. Rakove describes how, in preparation for a 1776 meeting of the Virginia House of Delegates set to consider several petitions in favor of disestablishing the Church of England in that state, Jefferson read and made copious notes on his copy of Locke's *Letter*, including the tantalizing observation: "It was a great thing to go so far (as he himself sais [sic] of the parl[iament] who framed the act of toler[atio]n) . . . but where he stopped short, we may go on."<sup>159</sup>

Even so, Locke's *Letter* went pretty far. Consider its preface "To the Reader," which declared: "*It is neither Declarations of Indulgence, nor Acts of Comprehension, such as have yet been practised [sic] or projected amongst us . . . . [t]he first will but palliate, the second increase our Evil.*"<sup>160</sup> Rather, "*Absolute Liberty, Just and True Liberty, Equal and Impartial Liberty, is the thing that we stand in need of.*"<sup>161</sup> Here we find a ringing endorsement of evangelical liberty—and rejection of "mere" toleration—beyond anything Williams ever wrote. The only problem is, of course, that Locke did not write it either. For as Jefferson himself did not realize, nor have many commentators since, the *Letter's* preface was written not by Locke himself, but by his friend and translator William Popple (1638–1708)—a figure who has yet to receive his due from intellectual historians.<sup>162</sup>

Popple had been a wine merchant, based in Bordeaux with his family, before the Revocation of the Edict of Nantes by Louis XIV in 1685 put an end to the formal toleration of Protestantism in

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158. For the latest version of this argument, see generally JOHN WILLIAM TATE, *LIBERTY, TOLERATION AND EQUALITY: JOHN LOCKE, JONAS PROAST AND THE LETTERS CONCERNING TOLERATION* (2016).

159. RAKOVE, *supra* note 19, at 4 (quoting Thomas Jefferson, Notes on Locke and Shaftesbury, in 1 THE PAPERS OF THOMAS JEFFERSON, 1760–1776, at 544, 548 (Julian P. Boyd ed., 1950)).

160. William Popple, *Preface* to JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), reprinted in A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 3, 4 (Mark Goldie ed., 2010).

161. *Id.*

162. The one notable exception is Caroline Robbins, *Absolute Liberty: The Life and Thought of William Popple, 1638–1708*, 24 WM. & MARY Q. 190 (1967).

France.<sup>163</sup> He was able to return to England only with difficulty, possibly through Penn's personal intervention with James II.<sup>164</sup> By the time he undertook to translate Locke's *Letter*—written originally in Latin in 1685 as an *Epistola de Tolerantia*<sup>165</sup>—Popple had published his own *A Rational Catechism*, as well as the exhaustively titled *Three Letters tending to Demonstrate how the Security of this Nation against all Future Persecution for Religions in the Abolishment of the Present Penal Laws . . . and the Establishment of a New Law for Universal Liberty of Conscience*.<sup>166</sup> As this title suggests, Popple was already on record as viewing mere “indulgence” as insufficient.

Recalling the place of Popple in what we know today as Locke's *Letter* reminds us also of the conditions under which the original *Epistola de Tolerantia* was produced. Like Popple, Locke was in Europe at the Revocation; but unlike Popple, he was safe in the Netherlands when the Edict was revoked.<sup>167</sup> There, Locke witnessed the arrival of countless Huguenots “refugees” (from the French *refugiez*) fleeing persecution.<sup>168</sup> He appears to have written the original *Epistola* at the request of his friend Philipp van Limborch, a Dutch theologian and professor in Amsterdam.<sup>169</sup> Despite its seemingly quintessential Englishness, then, Locke's *Letter* was written originally in Latin for a European audience and addressed to the problems of international Protestantism, rather than in English for dissenters seeking toleration for themselves either outside of or within an established National Church.

Indeed, before he fled England as a suspected terrorist in 1683—when several of his friends were discovered behind the Rye House Plot to assassinate Charles II along with his openly Catholic brother, James<sup>170</sup>—Locke had been notoriously lukewarm on

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163. *Id.* at 191–92.

164. *Id.* at 203–04.

165. Mark Goldie, *Introduction* to A LETTER CONCERNING TOLERATION AND OTHER WRITINGS, *supra* note 160, at ix, xi.

166. Robbins, *supra* note 162, at 190–91.

167. 2 ERIC MACK, JOHN LOCKE 10 (John Meadowcroft ed., 2013).

168. BEJAN, *supra* note 24, at 127.

169. Svensson, *supra* note 140, at 308.

170. Philip Milton, *John Locke and the Rye House Plot*, 43 HIST. J. 647, 649, 666–67 (2000).

toleration.<sup>171</sup> His early unpublished *Tracts on Government* (c. 1660–2), written while a young scholar at Oxford, reflected his rather enthusiastic embrace of Hobbes’s arguments in *Leviathan* (1651) in favor of a formally intolerant, albeit latitudinarian, establishment in service to the state.<sup>172</sup> A visit to Cleves in 1665 apparently convinced Locke that peaceful coexistence between those who differed in religion was at least possible.<sup>173</sup> Still, his 1667 *Essay Concerning Toleration* endorsed comprehension (or “latitudinism”) as the preferred course:

[T]oleration conduces no otherwise to the settlement of a government than as it makes the majority of one mind and encourages virtue in all, which is done by . . . making the terms of church communion as large as may be, i.e., that your articles in speculative opinions be few and large, and ceremonies in worship few and easy.<sup>174</sup>

Once achieved, a supplementary indulgence could accommodate any non-Christians and “fanatics” who remained of necessity outside the National Church.

Needless to say, Locke would later change his tune and embrace toleration as a matter of right for Christians and non-Christians alike. Still, one must be careful not to lose sight of Popple’s hand in the *Letter*’s more radical moments. Consider its famous definition of a church as “a voluntary Society of Men, joining themselves together of their own accord,” like other private associations of “Philosophers for Learning, of Merchants for Commerce, or of men of leisure for mutual Conversation and

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171. MACK, *supra* note 167, at 10. For a comprehensive treatment of Locke’s intellectual development on the issue of toleration, see generally JOHN MARSHALL, JOHN LOCKE, TOLERATION AND EARLY ENLIGHTENMENT CULTURE (2006).

172. See BEJAN, *supra* note 24, at 115–20. For more on Locke’s early Hobbesism, see generally JEFFREY R. COLLINS, IN THE SHADOW OF LEVIATHAN: JOHN LOCKE AND THE POLITICS OF CONSCIENCE (2020).

173. Letter from John Locke to Robert Boyle (Dec. 12, 1665), in 1 THE CORRESPONDENCE OF JOHN LOCKE 227, 228 (E. S. De Beer ed., 1976).

174. JOHN LOCKE, AN ESSAY CONCERNING TOLERATION (1667), *reprinted in A LETTER CONCERNING TOLERATION AND OTHER WRITINGS*, *supra* note 160, at 105, 131–32.

Discourse.”<sup>175</sup> Later in the *Letter*, the motives drawing men together in churches are compared with those seeking “Company for Trade and Profit: [or] Others, for want of Business, [who] have their Clubs for Clarret.”<sup>176</sup> But the “Clarret” line was Popple’s, evidently inspired by his own experiences as a wine merchant (and likely oenophile).<sup>177</sup> Locke’s own examples of philosophical societies and clubs for conversation among men of leisure were more edifying and high-minded on the whole.<sup>178</sup>

Locke’s definition of a church is often compared to Williams’s in *The Bloody Tenent*, but notice that the emphasis in the former was on the private and informal nature of the association between individuals in search of the joys of “company,” rather than the legal incorporation of a *company* that might therefore own and alienate property, make contracts, and press claims in a court of law. Although both implied an equally radical transformation when it came to the traditional, corporal understanding of membership in the Christian church—instead of being a “member” of the body of Christ, like a hand or a foot, the individual becomes a voluntary “member” of a private club—the *privacy* of Locke’s spiritual associations was, crucially, consistent with the persistence of a properly *public* form of worship.

More fundamentally, in Locke one can recognize the development of the modern private sphere—as a conceptual and physical space in which individuals freely associated with one another on the basis of their particular beliefs and interests—as an intellectual and institutional emanation of public religion.<sup>179</sup> And

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175. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in A LETTER CONCERNING TOLERATION AND OTHER WRITINGS*, *supra* note 160, at 7, 15–16 (footnote omitted).

176. *Id.* at 56.

177. *See Notes on the Texts*, in A LETTER CONCERNING TOLERATION AND OTHER WRITINGS, *supra* note 160, at xxix, xxxi.

178. Popple himself was a member of one such Lockean association, the unprepossessingly named “Dry Club.” MARSHALL, *supra* note 171, at 519. Perhaps he was trying to send Locke a message with his translation?

179. *Cf.* Abizadeh, *supra* note 26, at 264–65 (“[A] key social and ideological function of the emerging private sphere in the early modern period was, rather than to protect diversity, to make public *uniformity* possible.”). For a systematic treatment of the emergence of the concept of privacy, see generally Russell Bogue, *Privacy: A Political Approach* (2020) (unpublished Ph.D. dissertation, University of Oxford) (on file with the University of Oxford Libraries).

yet, many scholars nonetheless infer a “Lockean” commitment to disestablishment in the *Letter*. Rakove, for example, cites his insistence that:

No body [sic] is born a Member of any Church. Otherwise the Religion of Parents would descend unto Children, by the same right of Inheritance as their Temporal Estates, and every one would hold his Faith by the same Tenure he does his Lands; than which nothing can be imagined more absurd.<sup>180</sup>

Or even more resolutely, that “there is absolutely no such thing, under the Gospel, as a Christian Commonwealth.”<sup>181</sup> Not even Williams could (or did) say it better.

Certainly, there is a principle of separation implied here. But of what? “Church” and “State,” yes, but in what sense? In Locke, as in Williams, the emphasis remains on “churches” and “civil societies” as distinct forms of community—the former voluntary, the latter involuntary—each with its different standards of membership. Locke is more emphatic than Williams that an individuals’ civil rights must not depend on church membership, but then again, he was writing in a European context facing a rising tide of Protestant refugees to countries that already had their own public Protestant churches.<sup>182</sup> Yet like Williams, Locke looked beyond the confines of Protestant Christianity to imagine the implications of his arguments for other kinds of difference: “Nay if we may openly speak the Truth and as becomes one Man to another; neither *Pagan*, nor *Mahumetan*, nor *Jew*, ought to be excluded from the Civil Rights of the Commonwealth, because of his Religion.”<sup>183</sup> This is, at first blush, a toleration of truly Williams-esque largesse.

Still, it does not seem that Locke’s understanding of separation demanded the disestablishment of public churches in the way that many modern readers assume. Despite his heterodoxy, Locke himself remained a communicating member of the Church of England all of his life.<sup>184</sup> While this was initially a matter of

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180. LOCKE, *supra* note 175, at 15; see RAKOVE, *supra* note 19, at 46.

181. LOCKE, *supra* note 175, at 42.

182. For background, see generally HAEFELI, *supra* note 27.

183. See LOCKE, *supra* note 175, at 15.

184. See Samuel C. Pearson, Jr., *The Religion of John Locke and the Character of His Thought*, 58 J. RELIGION 244, 245, 256, 260 (1978).

compulsion, after the Act of Toleration suspended punishments for non-attendance and non-conformity, it became a matter of choice. And for Locke, individual choice—not disestablishment—had always been the point.<sup>185</sup> The familiar picture of Locke as a political radical and would-be revolutionary in exile thus distracts from the fact that by the time the *Letter* was published—in the same year as his celebrated *Essay Concerning Human Understanding* and the (anonymous) *Two Treatises of Government*—Locke was back in London and well on his way to bureaucratic respectability.<sup>186</sup>

Over the next fifteen years, until his death in 1704, Locke would become a distinguished public servant,<sup>187</sup> one who evidently used his position on the Board of Trade and Plantations to secure a place for Popple as its secretary.<sup>188</sup> As a respectable bureaucrat, Locke counted many latitudinarian clergymen among his friends and acquaintances, above all the Bishop of Salisbury, Gilbert Burnet.<sup>189</sup> In his long-running controversy with the conservative clergyman Jonas Proast in defense of the original *Letter*, Locke recommended Burnet's *Pastoral Care* (1692) as a model of clerical moderation.<sup>190</sup> Locke's campaign against Proast would produce three more *Letters on Toleration* (the last of which remained unfinished at his death), in which some combination of toleration outside of *and* comprehension within the Church of England remained his preferred policy arrangement.<sup>191</sup>

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185. Cf. LOCKE, *supra* note 175, at 15 (“[T]he Power of Civil Government relates only to Mens [sic] Civil Interests; is confined to the care of the things of this World; and hath nothing to do with the World to come.”).

186. See MACK, *supra* note 167, at 10.

187. R.S. WOOLHOUSE, *LOCKE: A BIOGRAPHY* 361–419 (2007).

188. Robbins, *supra* note 162, at 210.

189. See Tony Claydon, *Latitudinarianism and Apocalyptic History in the Worldview of Gilbert Burnet, 1643–1715*, 51 *THE HIST. J.* 577, 580 (2008).

190. JOHN LOCKE, *A THIRD LETTER FOR TOLERATION* (1692), reprinted in *A LETTER CONCERNING TOLERATION AND OTHER WRITINGS*, *supra* note 160, at 69, 95.

191. See Goldie, *supra* note 68, at 143. In a letter to Limborch, Locke identified both as forms of toleration—“The former signifies extension of the boundaries of the Church, with a view to including greater numbers by the removal of part of the ceremonies,” while “the latter signifies toleration of those who are either unwilling or unable to unite themselves to the Church of England on the terms offered to them.” Letter from John Locke to Phillipus van

In this preference, Locke himself was clearly much less radical than Williams or Popple. And recognizing this fact, in turn, allows us to make sense of—rather than apologize for or explain away—the *Letter's* more uncomfortable features, above all its implicit exclusion of Roman Catholics from toleration (via an analogy to the followers of the “*Mufti of Constantinople*”), as well as the explicit exclusion of atheists (for “the taking away of God, though but even in thought, dissolves all”).<sup>192</sup> Both suggest that while Locke was straightforwardly opposed to penal laws and wanted to break the Church of England’s monopoly on public worship, he nonetheless accepted the use of Test Acts and civil oaths as a means of ensuring that only those who supported this “tolerant” ecclesiastical settlement could participate fully as equals in public life. That there would still be a role for the state in regulating religion is further evidenced by Locke’s insistence that only those churches that “own and teach the Duty of tolerating All men in matters of meer [sic] Religion” have the right to be tolerated themselves.<sup>193</sup> This is not simply a theoretical claim, that the intolerant have themselves no claim to toleration<sup>194</sup>; rather, in the context of seventeenth-century English establishment, Locke’s statement implies an ongoing need for policing by the state of both religious doctrine and personnel.

In *Mere Civility*, I highlighted the role that the idea of trust or *fides* plays in Locke’s political theory, and how for him, that trust was predicated on a set of shared beliefs—in the existence of God, for example, and of rewards and punishments in the afterlife—as the foundation of any mutually tolerable civil society.<sup>195</sup> Here, I want to emphasize how Locke’s sense of a profound need for this minimal, but necessarily *creedal*, kind of conformity complemented his conviction that established churches and their clergy might yet have an important role to play in tolerant societies, as models of moral virtue and “reasonable” religion for others.<sup>196</sup> For example,

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Limborch (Mar. 12, 1689), in 3 THE CORRESPONDENCE OF JOHN LOCKE 582, 584 (E.S. de Beer ed., 1978).

192. LOCKE, *supra* note 175, at 52–53.

193. *Id.* at 51.

194. See JOHN RAWLS, A THEORY OF JUSTICE 191–93 (rev. ed. 1999).

195. BEJAN, *supra* note 24, at 136–38.

196. Cf. JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY 180 (George W. Ewing ed., Regnery Gateway 1989) (1695) (a basic faith and acceptance of



even in the *Letter* itself, the civil magistrate retains a hortatory role as an evangelist with superior resources with which to extol the virtues of true Christianity.<sup>197</sup>

Historians of American law and religion have noted the emergence of an informal “moral” or “indirect establishment” in nineteenth century America, despite the First Amendment, in the form of religious tests, temperance campaigns, bible reading in schools, and Sabbatarian legislation.<sup>198</sup> In the 1690s, Locke likewise favored the public campaigns against vice associated with the so-called “Reformation of Manners,” led by latitudinarian bishops like Burnet.<sup>199</sup> Locke’s notorious 1697 *Essay on the Poor Law* argued that children caught begging should be sent to public “working schools” wherein they might be made to “come constantly to church every Sunday,” because “their idle and loose way of breeding up [made them] as utter strangers both to religion and morality as they are to industry.”<sup>200</sup> And, as the political theorist Jack Turner has shown, Locke approved and facilitated state-supported missionary efforts among the American Indians in his

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gospel “suits the lowest capacities of reasonable creatures” so that society may function with the morals necessary to disabuse its citizens of “any conceits, any wrong rules, [and] anything tending to their own self-interest . . . in their morality”).

197. LOCKE, *supra* note 175, at 13–14; cf. COREY BRETTSCHEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY 21 (2012) (“Rights such as freedom of expression correctly protect citizens against coercive intervention, but I argue that these rights do not extend to a right not to be persuaded by the state.”).

198. RAKOVE, *supra* note 19, at 122; compare STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA 149–205 (2010) (outlining how Christian-majority sentiments policed minorities through the law in the nineteenth century), and Jud Campbell, *Testimonial Exclusions and Religious Freedom in Early America*, 37 LAW & HIST. REV. 431, 431–92 (2019) (focusing particularly on the inability for non-Christians to testify in courts of law).

199. See WILLIAM J. BULMAN, ANGLICAN ENLIGHTENMENT: ORIENTALISM, RELIGION AND POLITICS IN ENGLAND AND ITS EMPIRE, 1648–1715, at 254–55 (2015); Karen Sonnelitter, *The Reformation of Manners Societies, the Monarchy, and the English State, 1696–1714*, 72 HISTORIAN 517, 518–20 (2010).

200. JOHN LOCKE, ESSAY ON THE POOR LAW (1697), reprinted in POLITICAL ESSAYS 182, 191–92 (Mark Goldie ed., 1997).

capacity as a member of the Board of Trade and Plantations of the kind that Williams abhorred.<sup>201</sup>

Still, there remains a crucial difference between Locke's version of an "indirect" moral establishment, and that favored by Americans in the nineteenth century. Whereas the latter was led by a mass movement of greatly "awakened" evangelical Christians, Locke's cultural establishment was to be the top-down work of "reasonable" gentlemen—government bureaucrats like himself, along with latitudinarian clergymen like Burnet—who might model civility and moderation for others while acting as moral censors from their institutional perches in parish churches and Universities, or any other non-governmental yet representatively "public" institutions overseen and supported by the state.<sup>202</sup>

All of this should remind us that there is quite a lot of space between Roger Williams's radical commitment to religious *deregulation*, both in New England and Old, and Locke's more moderate *establishmentarian* vision of reform. Asked whether America is a Christian nation, Locke might respond, then, that it is—and that it is foolhardy for any Christian nation not to maintain an irenic and liberal "establishment" in its public institutions, one sufficient to moderate the nation's more intolerant impulses. Whereas Williams's inadvertent establishment of evangelical Protestantism dismantled the dynamic of dissent, Locke's informal establishment of liberal Protestantism preserved it. Religious non-conformity would and should be legalized; yet there should also remain an established church around which individuals and private associations might or might not choose to conform.

#### V. IRENIC LIBERALISM

Keeping the contrast between Williams's evangelical sectarianism and Locke's irenic liberal Protestantism in mind, we are now in a position to see—contrary to the contemporary critics of liberalism considered in the introduction—that not all sublimated Protestantisms are created equal. We are also in a

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201. See Jack Turner, *John Locke, Christian Mission, and Colonial America*, 8 *MOD. INTELL. HIST.* 267, 275 (2011).

202. For an American version of Locke's ecclesiastical establishment in the form of Thomas Jefferson's visions of a public university, see RAKOVE, *supra* note 19, at 161–62 (in Jefferson's view, "the point of education . . . was to enable children to reach an age when they would be capable of ascertaining their own norms of religious truth or faith").

position to appreciate better the long shadow that these early modern debates cast over the way that we continue to think and speak about religious difference in the United States today—not only in academia, but in the broader public sphere.

For example, the conceptual presuppositions of a religious establishment—whether evangelical or irenic—can be seen in the “parochial” vocabulary employed by political theorists to this day, which continues to bear tell-tale traces of the statist-confessional English ecclesiastical context, without a compensatory awareness of the tensions this context sometimes produces in our theories. The basic liberal model of toleration as the accommodation of “dissent”—whether of individuals singly or collectively in voluntary association with others—presupposes a *consensus*; while the term “disestablishment” applies properly only to contexts wherein there had formerly been an established Church.<sup>203</sup>

Indeed, it is hard to exaggerate the lasting cultural impact of the English tradition of dissenting Protestantism on modern liberalism, beginning with John Stuart Mill.<sup>204</sup> It is evident in the continued liberal valorization of dissent, and its elevation of the individual dissenter or “conscientious objector” as a heroic figure, as in Mill’s account of Socrates or Robert Bolt’s depiction of Thomas More in *A Man For All Seasons*.<sup>205</sup> In this section, I shall focus on one paragon of American liberalism, in particular, for whom this establishmentarian model was also fundamental.

As noted in the introduction, John Rawls’s arguments have exercised an outsized influence on how political theorists and jurists continue to understand the demands of secular liberal societies with respect to religion. And, as we have seen, Rawls himself was emphatic in claiming the significance of early modern toleration debates in the development of modern liberalism.

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203. This is why Laborde prefers the term “nonestablishment” in explicating liberal principles, but her locution has not yet caught on. LABORDE, *supra* note 8, at 69.

204. See, e.g., John Gray, *John Stuart Mill on Liberty, Utility, and Rights*, 23 HUM. RTS. 80, 80–116 (1981); J. Salwyn Shapiro, *John Stuart Mill: Pioneer of Democratic Liberalism in England*, J. HIST. IDEAS 127, 127–60 (1943); Brandon P. Turner, *John Stuart Mill and the Antagonistic Foundation of Liberal Politics*, 72 REV. POL. 25, 25–53 (2010).

205. See Frederick Rosen, *J.S. Mill on Socrates, Pericles and the Truth*, 25 J. LEGAL HIST. 181, 186–88 (2004); see generally JACOB T. LEVY, RATIONALISM, PLURALISM, AND FREEDOM (2014).

Rawls was also an unstinting separationist. His 1971 book *A Theory of Justice* used the terms “toleration,” “religious freedom,” and “liberty of conscience” interchangeably,<sup>206</sup> while *Political Liberalism* associated these straightforwardly with the separation of church and state.<sup>207</sup> Indeed, the influential theory of “public reason” he proposed in the later work actually worked to extend the wall of separation between religion and politics to public discourse itself, by governing the justification of matters pertaining to “constitutional essentials and questions of basic justice” in a well-ordered society.<sup>208</sup>

Nevertheless, one can see clearly at work in Rawls’s thought traces of both the evangelical and irenic Protestant impulses associated with Williams and Locke, respectively. Before his death in 2002, the suggestion that Rawls had been a Protestant thinker, or that his religious identity had in any way inflected his theory of political liberalism, would have been deeply offensive to many self-identified “Rawlsians.” Even with publication in 2009 of his Princeton undergraduate thesis, *A Brief Inquiry into the Meaning of Sin and Faith: An Interpretation Based on the Concept of Community*, its editor made sure to include a previously unpublished 1997 reflection, *On My Religion*, in the same volume, as a record of exactly where and when Rawls had lost his faith.<sup>209</sup>

This was reputedly in the Pacific theater in World War II; but before he enlisted, the young Rawls evidently considered training as an Episcopalian priest.<sup>210</sup> Reading the undergraduate thesis in light of this surprising fact is fascinating, particularly in its emphasis on Christian communalism. The young Rawls argued

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206. See RAWLS, *supra* note 194, at 180–94.

207. See Rawls, *Public Reason Revisited*, *supra* note 3, at 440–90.

208. RAWLS, *POLITICAL LIBERALISM*, *supra* note 3, at 215.

209. See generally JOHN RAWLS, *A BRIEF INQUIRY INTO THE MEANING OF SIN AND FAITH: WITH “ON MY RELIGION”* (Thomas Nagel ed., 2009). On the first page of the thesis, Rawls tells us that “the sooner we stop kow-towing to Plato and Aristotle the better [because] [a]n ounce of the Bible is worth a pound (possibly a ton) of Aristotle.” John Bordley Rawls, *A Brief Inquiry into the Meaning of Sin and Faith: An Interpretation Based on the Concept of Community* (1942) [hereinafter RAWLS, *A BRIEF INQUIRY*], in *A BRIEF INQUIRY INTO THE MEANING OF SIN AND FAITH*, *supra*, at 103, 107. He also declared that this “writer happens to” believe in the existence of devils and angels. *Id.* at 148.

210. Eric Gregory, *Before the Original Position: The Neo-Orthodox Theology of the Young John Rawls*, 35 *J. RELIGIOUS ETHICS* 179, 184 (2007).

that sin should be understood as that which “destr[oys] and repudiat[es]” community, while faith is “the inner state of a person who is properly integrated and related to community.”<sup>211</sup> Indeed, Rawls makes the strong, Augustinian claim that human beings are moral persons by virtue of their creation “*Imago Dei* as that which in man makes him capable of entering into community by virtue of [his] likeness to God, who is in Himself community,” i.e., in the form of the Trinity.<sup>212</sup>

Rawls’s early obsession with community as constitutive of human personality is preserved in his ostensibly individualistic mature writings: his claim in *A Theory of Justice* that “[o]nly in a social union is the individual complete”<sup>213</sup> presents a milder version of his earlier claim in the thesis that man “is nothing until he is in community” with others or that “[c]ommunality . . . constitutes the inner essence of man’s being.”<sup>214</sup> Accordingly, in the last decade a number of political theorists and historians have worked to restore Rawls’s religion as an important feature of his intellectual formation, one that exercised an often unacknowledged influence on the direction of his thought long after he had given up on the priesthood.<sup>215</sup>

Rawls first made his famous claim about “the wars of religion of the sixteenth and seventeenth centuries” following the Reformation as the context within which the principle of toleration (and hence the tradition of political liberalism) developed in his Tanner lectures at Oxford in 1977.<sup>216</sup> And yet his fascination with

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211. RAWLS, A BRIEF INQUIRY, *supra* note 209, at 113.

212. *Id.*

213. RAWLS, *supra* note 194, at 523 n.4.

214. RAWLS, A BRIEF INQUIRY, *supra* note 209, at 126, 215.

215. See generally ERIC NELSON, THE THEOLOGY OF LIBERALISM: POLITICAL PHILOSOPHY AND THE JUSTICE OF GOD (2019); P. Mackenzie Bok, *To The Mountaintop Again: The Early Rawls and Post-Protestant Ethics in Postwar America*, 14 MOD. INTELL. HIST. 153 (2017); Gregory, *supra* note 210.

216. John Rawls, *The Basic Liberties and Their Priority*, in LIBERTY, EQUALITY, AND LAW: SELECTED TANNER LECTURES ON MORAL PHILOSOPHY 3, 17 (John Rawls & Sterling M. McMurrin eds., 1987). This claim would become most closely associated with *Political Liberalism*, but it appears with almost identical phrasing in John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHILOSOPHY & PUB. AFFAIRS 223, 223–51 (1985) [hereinafter Rawls, *Justice as Fairness*], JOHN RAWLS, THE LAW OF PEOPLES (1999), and JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001)

the historical process whereby the principle of toleration was accepted in Western Europe began much earlier. In *On My Religion*, Rawls described reading Henry Lea's massive multi-volume history of the Spanish Inquisition and Lord Acton's review of it, shortly after his return to the United States after WWII, and he credited these with his increasing awareness of the persecutory potential of Christianity.<sup>217</sup>

Rawls's historical interest in toleration piqued his philosophical curiosity, in turn. "Tolerance and its Justifications" would be the subject of one of his earliest lectures as an assistant professor of Philosophy at Cornell (c.1953–55).<sup>218</sup> In a lecture at Harvard in the early 1960s, he presented the general acceptance of religious toleration—as well as the moral (if not political) rejection of racial segregation—as evidence that the "leading political and social questions of the modern age" were "in our country [e.g., the United States] in a sense resolved."<sup>219</sup> The optimism of a mid-century American liberal—one who believed that the telos of secular liberal democracy could be achieved in the United States under a Supreme Court led by Chief Justice Warren—can be seen in *Theory*, as well. That work offered a highly theoretical and abstract version of the "first freedom" argument, in which religious liberty was treated as the individual right from which all others must flow.<sup>220</sup>

In *Theory*, liberty of conscience emerged as the first, "basic" liberty agreed upon in the Original Position and from which all the others could be derived: once "[t]he question of equal liberty of conscience is settled. . . . [t]he reasoning in this case can be generalized to apply to other freedoms, although not always with

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[hereinafter RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT], as well as in Rawls's collected lectures on moral and political philosophy.

217. John Rawls, *On My Religion* (1997), in *A BRIEF INQUIRY INTO THE MEANING OF SIN AND FAITH*, *supra* note 209, at 259, 264.

218. John Rawls, *Tolerance and its Justifications* (unpublished essays and notes) (on file with Harvard University Archives, Rawls Papers, Box 7, Folder 16) (Courtesy of Harvard University Archives).

219. John Rawls, *Some Notes on the Use of Political Philosophy* (undated) (on file with the Harvard University Archives, Rawls Papers, Box 35, Folder 10) (Courtesy of Harvard University Archives).

220. See RAWLS, *supra* note 194, at 180–90.

the same force.”<sup>221</sup> Lest one quibble that arguments for liberty of conscience are not necessarily the same as arguments for religious freedom, Rawls explained in a footnote that the principle of equal liberty derives from the “intuitive idea . . . [of] generaliz[ing] the principle of religious toleration to a social form, thereby arriving at equal liberty in public institutions.”<sup>222</sup>

Thus, Rawls’s influential statement in *Justice as Fairness: Political not Metaphysical*, that the “public conception of justice” at the heart of liberal or constitutional democracy derives from “apply[ing] the principle of toleration to philosophy itself” simply extended and refined a point he had made fifteen years earlier in *Theory*.<sup>223</sup> He rendered this theoretical claim about the priority of toleration for liberalism historical a few years later in *Political Liberalism*. But what surprises the visitor to Rawls’s archived papers at Harvard is how historically minded he had been about religious toleration from the very start.<sup>224</sup> Throughout the 1950s, Rawls had done an impressive amount of historical research, taking extensive notes on the Huguenot debates in Holland following the Revocation of the Edict of Nantes into which Locke’s own *Epistola* was an intervention.<sup>225</sup>

More surprising still is what caught Rawls’s historical interest. This was above all the so-called “Compromise Theory of Tolerance” offered by the little-known Dutch theologian Isaac d’Huisseau.<sup>226</sup>

221. *Id.* at 206.

222. *Id.* at 205 n.6. This statement would, of course, surprise many of the early modern defenders of religious toleration we have considered thus far.

223. Rawls, *Justice as Fairness*, *supra* note 216, at 223.

224. See generally Teresa M. Bejan, *Rawls’s Teaching and the ‘Tradition’ of Political Philosophy*, MOD. INTEL. HIST. (Forthcoming, published online, Mar. 9, 2021), <https://www.cambridge.org/core/journals/modern-intellectual-history/article/rawlss-teaching-and-the-tradition-of-political-philosophy/99BC1219C38EECFD8A18613E2E7CB5AA> [perma.cc/FR44-S6J2].

225. *Id.* at 29.

226. See John Rawls, *Compromise Theory of Tolerance – Agreement on Essentials* (undated handwritten notes) (on file with Harvard University Archives, Rawls Papers, Box 7, Folder 16) (Courtesy of Harvard University Archives); John Rawls, *Jurieu’s Refutation of Compromise Theory* (undated handwritten notes) (on file with Harvard University Archives, Rawls Papers, Box 7, Folder 16) (Courtesy of Harvard University Archives); John Rawls, *Pre-conditions of Persecution*, (undated handwritten notes) (on file with Harvard University Archives, Rawls Papers, Box 7, Folder 16) (Courtesy of Harvard University Archives).

As the title suggests, this was, in fact, an irenic Protestant theory of comprehension through creedal minimalism and sacramental inclusion of the kind developed by latitudinarians in England like Burnet.<sup>227</sup> Similarly, in *On My Religion*, Rawls cited as inspiration not Locke's *Letter*, nor any other classic text of the Anglo-American liberal tradition, but rather an obscure bit of irenic esoterica by the French jurist Jean Bodin (c.1530–96):

Of the many texts I have read on religion, few have struck me as much as Bodin's . . . *Colloquium of the Seven [on the Secrets of the Sublime]*. . . . For him, toleration is an aspect and consequence of the harmony of nature as expressed in God's creation. . . . At the end of the *Colloquium*, the seven speakers agree to abandon their attempts to refute one another's religious opinions, and instead to encourage one another to describe their religious views so that all may learn what others think and be able to understand what their beliefs are in their best light. Thus, while friendly and sympathetic discussion of our beliefs is accepted as an important part of religious life, argument and controversy are not. In view of the harmony and multiplicity of religions, what point would argument and controversy serve?<sup>228</sup>

In 1997, Rawls was explicit that what appealed to him most in Bodin was his irenicism—that is, his willingness to see religious differences between those who were otherwise agreed in a moral way of life as, strictly speaking, *indifferent*. It was a vision of religion in line with the liberal Episcopalian Protestantism of Rawls's youth.<sup>229</sup> Moreover, it suggested that this liberal Protestant outlook continued to structure his thinking about the form and features of a tolerant society, long after he left that particular church.

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227. *Id.*

228. Rawls, *supra* note 217, at 266; *cf.* FORST, *supra* note 83, at 151 (using a "Rawlsian expression" of "reasonable disagreement" to describe the religious debate in Bodin's work). The *Colloquium* was first published in English in 1975. See generally JEAN BODIN, COLLOQUIUM OF THE SEVEN ABOUT SECRETS OF THE SUBLIME (Marion Leathers Daniels Kuntz trans., Princeton U. Press 1975) (1857). Rawls must have read it shortly thereafter.

229. See Rawls, *supra* note 217, at 261.



We can see now that Rawls's interest in historical arguments for comprehension bore theoretical fruit in *Political Liberalism*. Whereas a *Theory of Justice* had focused on "congruence" and the "harmony of interests" as the bonds of well-ordered society, *Political Liberalism* stressed the harmony of affect.<sup>230</sup> The latter was an avowedly irenic tract—as Rawls put it in retrospect in 1998: "I make a point in *Political Liberalism* of really not discussing anything, as far as I can help it, that will put me at odds with any theologian, or any philosopher."<sup>231</sup> One sees this irenic orientation not only in its search for an underlying agreement on the *fundamenta* of liberalism that can serve as "the basis of . . . social unity" in a liberal society,<sup>232</sup> but also in its hope for an appropriately constrained form of public discourse, through which citizens' disagreements might be transformed into sources of solidarity.

Rather than an idealized extension of the principle of disestablishment, then, Rawls's idea of public reason appears here as an irenic attempt to take controversial items off of the agenda for the sake of reconciliation—much like the early modern arguments for comprehension that had inspired Locke centuries before. As Rawls put it in the *Idea of Public Reason, Revisited*:

Harmony and concord among doctrines and a people's affirming public reason are unhappily not a permanent condition of social life. Rather, harmony and concord depend on the vitality of the public political culture and on citizens' [sic] being devoted to and realizing the ideal of public reason. Citizens could easily fall into bitterness and

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230. Compare RAWLS, *supra* note 194, at 104–05, 453 (seeking to describe the "natural sense in which harmony of social interests is achieved" and "whether the sense of justice coheres with the conception of our good so that both work together to uphold a just scheme"), with RAWLS, POLITICAL LIBERALISM, *supra* note 3, at 213 (Public reason "presents how things might be, taking people as a just and well-ordered society would encourage them to be. It describes what is possible and can be, yet may never be, though no less fundamental for that.").

231. Bernard Prusak, *An Interview with John Rawls: Politics, Religion, and the Public Good*, COMMONWEAL, Sept. 25, 1998, at 12, 12–17, reprinted in JOHN RAWLS, COLLECTED PAPERS 616, 621–22 (Samuel Freeman ed., 1999).

232. RAWLS, POLITICAL LIBERALISM, *supra* note 3, at 63.

resentment, once they no longer see the point of affirming an ideal of public reason and come to ignore it.<sup>233</sup>

Evidently, Rawls believed that in this regard political philosophers like himself occupying positions within the intellectual establishment had an important role to play in democratic societies. *Justice as Fairness: A Restatement* presented the first “practical role” of political philosophy as “arising from divisive political conflict and the need to settle the problem of order”:

We suppose, then, that one task of political philosophy . . . is to focus on deeply disputed questions and to see whether, despite appearances, some underlying basis of philosophical and moral agreement can be uncovered. Or if such a basis of agreement cannot be found, perhaps the divergence of . . . opinion at the root of divisive political differences can at least be narrowed.<sup>234</sup>

The apparent optimism underlying this approach had been remarked upon years earlier by Isaiah Berlin: “[m]y only doubts arise about the degree of your optimism in the possibility of offering your views, with which I totally agree, as a permanent basis within which disagreements can be resolved.<sup>235</sup>

In this section, I have not been concerned to unmask or debunk the ostensibly “secular” views put forward by Rawls and his followers as fundamentally theological, in the style of some of liberalism’s critics. Rather, I have sought to show that the striking Christian communalism of Rawls’s early work informed his later preoccupation with the sources of social unity in a liberal society. On this view, the shift in Rawls’s considered judgments on that score between *Theory* and *Political Liberalism* was akin to an increasingly latitudinarian expansion of the bounds of orthodoxy, in the hope that the bonds formed between citizens united by an overlapping consensus might render their civil communion stable over time. Only now, Rawls insisted that those bonds would not be

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233. Rawls, *Public Reason Revisited*, *supra* note 3, at 485.

234. RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT*, *supra* note 216, at 2.

235. Letter from Isaiah Berlin to John Rawls (Aug. 31, 1988) (on file with the Harvard University Archives, Rawls Papers, Box 39, Folder 6) (Courtesy of Harvard University Archives).

of Christian love, but of civic friendship, reciprocity, and mutual respect.<sup>236</sup>

Despite his apparent commitment to dis- or non-establishment as a necessary consequence of the separation of church and state, we might think of this shift in Rawls's thought as a shift from the "evangelical" liberal Protestantism of his youth to an ever more "irenic" form. But notice that, as in Locke's arguments, Rawls's vision of separation in his later works was also supplemented institutionally by an irenic liberal establishment, based not in churches, but in universities and within the legal profession. As guardians of public reason, this liberal establishment would clearly have an important role to play in maintaining norms of civility and modeling the intellectual work of reconciliation for their co-citizens—for example, by keeping religious arguments out of legislation and the courts.

To return to the question motivating this Symposium: twentieth-century liberals like Rawls would strongly deny that America is a Christian nation. Of course, Christians of many different denominations can and should be able to affirm the principles of justice as fairness underlying its secular and democratic political institutions from within their various theological worldviews; however, so should the adherents of any number of other reasonable comprehensive doctrines, religious and non-religious.<sup>237</sup> Nevertheless, maintaining the "reasonableness" of these doctrines would seem to rely on the ongoing entrenchment of irenic liberalism within the culture of our legal, educational, and, indeed, religious institutions and their leadership. Here, we find something like the informal moral establishment imagined by Locke—but one no longer limited exclusively to theists and other believers.

#### CONCLUSION

Contrary to modern expectations, the three pillars of the Anglo-American liberal tradition surveyed here do not speak univocally when it comes to the issue of (dis)establishment. In Rawls, as in Locke, one finds nothing like Williams's society of sects. While

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236. See Bejan, *supra* note 24, at 144.

237. See generally, ANDREW F. MARCH, *ISLAM AND LIBERAL CITIZENSHIP: THE SEARCH FOR AN OVERLAPPING CONSENSUS* (2009).

political liberalism on the Rawlsian model continues to presuppose the inadvertent establishment of evangelical Protestantism as a matter of law, it embraces Locke's irenic establishmentarian impulse as a matter of jurisprudential and academic culture. On this model, the state can maintain its formal separation from religion, while a cultural establishment of university-trained jurists and intellectuals sees to it, with public support, that the desired separation between religious and civil communities is maintained.

That American democracy and jurisprudence do not work this way in practice is, again, beside the point for political theorists like myself. The theory works well enough, and it continues to be taught in elite educational institutions across the world. And so, while I agree with Cecile Laborde in her response to liberalism's critics that liberalism itself is *not* a religion, I nevertheless believe that liberalism can and does function sometimes as an *established church*. On this view, liberal egalitarians like Rawls and Laborde herself are not so much "rootless" but emphatically *rooted* cosmopolitans, whose parish is not bounded geographically, but rather intellectually and institutionally through shared sacred texts (both the American Bill of Rights and the European Convention on Human Rights) and elite academic institutions. These (primarily Anglophone) universities credential the young people who populate international institutions and preach the virtues of an individualistic ethos that valorizes conscientious dissent—while nonetheless seeking to preserve and reproduce a dominant, liberal democratic consensus for individuals to dissent *from*. Within this informal cultural establishment, dissent (of the right kind) is admirable, as well as permissible. So long, that is, as it knows its place.

Little wonder, then, that Christians and conservatives complain vociferously today about the "liberal establishment" in America, whether in the law, the media, the arts, or above all the universities. As I have shown in this essay, university politics have long played a major part in the politics of religious establishment; why shouldn't the same be true today? In these and other controversies, one hears definite echoes of early modern debates, reflecting our ongoing—and perhaps inescapable—intellectual entanglement with the establishmentarian presuppositions that produced our American culture of dissent.

As for my own answer to the question at hand: Is America a Christian Nation? I say, yes and no. To this day, America *has* an

established religion in the evangelical and sectarian legal regime bequeathed to us by radical dissenters like Roger Williams and others of his ilk. It remains to be seen, however, whether the informal establishment of liberal jurists, academics, and intellectuals envisioned by Locke and Rawls can withstand the rising pressure from critics on the Right—and increasingly, on the Left—and maintain its social, cultural, and political privileges as the clerical elite in our established church.