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# QUAKER STATE: PENNSYLVANIA'S GUIDE TO REDUCING THE FRICTION FOR RELIGIOUS OUTSIDERS UNDER THE ESTABLISHMENT CLAUSE

**By Jim Wedeking***

## I. Introduction

Few statements have done more to confound a country than the ten simple words that begin our Bill of Rights: Congress shall make no law respecting an establishment of religion. None disagree with the wisdom of this declaration; but disagreements on its meaning have stirred a popular enmity that accompanies few other cultural or legal issues. Being that the first five words apply to all of the First Amendment, the heart of the Establishment Clause lies in the latter five. Given the text's ambiguity, the Supreme Court has indulged in navel-gazing, philosophizing, sloganeering, cultural analysis, and even insults in interpreting it.[1] Inquiries into the

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[1] *See* Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, Ch. J., dissenting) ("But even more disturbing than its holding is the tone of the

establishment of religion have focused on such bizarre distinctions as the distance between a crèche and a plastic candy cane,[2] the subjective feelings of hypothetical people,[3] or even whether people of faith might lobby their government and vote.[4] Yet, after almost sixty years of rhetorical skirmishing, no consistent interpretation of the Free Exercise and Establishment clauses prevails.

Aside from the consensus that barring an official religion is a good idea, the only other aspect of the Establishment Clause that most people agree upon is that we have exhausted all attempts to decipher its plain meaning. With each state-religion conflict there are new quests to understand the Establishment Clause through context; namely, the contemporaneous writings of the Founders, the condition of church-state relations prior to independence, and religious practices closely after ratification of the Constitution. The

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Court's opinion; it bristles with hostility to all things religious in public life"); County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989) ("Although Justice Kennedy repeatedly accuses the Court of harboring 'latent hostility' or 'callous indifference' toward religion, nothing could be further from the truth, and the accusations could be said to be as offensive as they are absurd") (citation omitted).

[2] *Id.*, at 675 - 676 (Kennedy, J., dissenting) ("This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure . . . 'It would be appalling to conduct litigation under the Establishment Clause . . . [with] witnesses testifying they were offended – but would have been less so were the crèche five feet closer to the jumbo candy cane'") (quoting American Jewish Congress v. Chicago, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting)).

[3] *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 800, n.5 (1995) (Stevens, J., dissenting) (complaining that Justice O'Connor's hypothetical "reasonable observer" is not as reasonable as Justice Stevens' hypothetical "reasonable observer").

[4] *See* Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (public financial support for religious schools teaching secular subjects is an excessive government entanglement partly because public debates on religion engender "political division along religious lines [which] was one of the principal evils against which the First Amendment was intended to protect …. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency.") (citations omitted); Zelman v. Simmons-Harris, 536 U.S. 639, 662, n.7 (2002) ("Justice Breyer would raise the invisible specters of 'divisiveness' and 'religious strife' to find the program unconstitutional . . . Nor is it clear where Justice Breyer would locate this presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find 'divisive.' (citations omitted)").

views of James Madison and Thomas Jefferson have been disproportionately relied upon and Virginia's religious history has become the most familiar source to those plumbing history for insight. While many of these resources were employed in deciphering the confluence of religion and education, tax subsidies, and public religious ceremonies, Madison and Jefferson have limited utility for resolving the church-state clash *du jour* – the religious outsider.

**A. Religious Outsiders, Equality, and the Establishment Clause Today**

Of course, the appearance of religious outsiders, meaning those practicing marginalized religions in America, are common in decisions interpreting the Free Exercise and Establishment Clauses. Many of the Supreme Court's most important religion clause cases came courtesy of Seventh Day Adventists, the Amish, and Jehovah's Witnesses. All of these cases involved plaintiffs seeking exemptions from generally applicable laws because these laws interfered with their religious practices. Many of these Free Exercise infringements were the result of myopic oversight, such as a failure to account for differing religious practices, while relatively few were intentional attacks on minority religions.

Where Free Exercise cases involve religious-outsider plaintiffs seeking an exemption from the law and toleration of minority religious practices, Establishment Clause cases are brought by plaintiffs to force the majority to change its behavior. The clearest difference between a Free Exercise case and an Establishment Clause case is that the latter seeks to protect the sensibilities of the minority by focusing on subjective feelings of anger, exclusion, embarrassment, or annoyance incurred by exposure to majority practices, while the former protects against compulsion to betray one's own beliefs and practices by taking part in a religious ceremony at odds with that plaintiff's conscience.

Establishment Clause plaintiffs tend to invoke less sympathy from the public than Free Exercise plaintiffs. Only a small part

of this seems attributable to conventional intolerance; the public is more forgiving towards unusual religious practices than impositions upon the majority by fringe plaintiffs viewed as intolerant towards mainstream America. In other words, the public resents demands to change its own behavior. On the other side, plaintiffs (and sometimes, courts) construe "establishment" as any official act or ceremony that makes one feel somehow less important than other Americans. While this may not go to equal protection in a Fourteenth Amendment sense, the underlying claim for many plaintiffs is that the Establishment Clause protects them from feeling like they are relegated to lower-class citizenry simply because they do not share the values of the Christian majority in America.

Michael Newdow, a prominent Establishment Clause activist, articulated his distaste for the prayer at the Presidential inauguration, which he described as "purely religious words . . . for Christian Americans to perceive them as an endorsement of their Christianity, and for non-Christian Americans including [Newdow] to perceive the [prayer] as a disapproval of their non-Christianity."[5] He believes that, as an atheist, witnessing a prayer during the 2001 Presidential inauguration "made him 'feel like a second class citizen and a political outsider on account of his religious beliefs," thus infringing on the Establishment Clause.[6] The public and political reaction against Newdow and his outsider views stem less from his lack of religious beliefs (i.e., attacking him as an atheist) than from his requested remedy—forcing the majority to bow to minority religious beliefs (attacking him as an activist). While Newdow's critics have been accused of oppression and McCarthyism, many simply doubt that the Constitution's terse religion clauses mandate that the Pledge of Allegiance, public prayers, "In God We Trust," and days off for Christmas be demolished for fear of inflicting subjective hurt feelings upon religious minorities, whom, despite their apprehensions, may freely vote, run for office, hold government jobs, own

[5] Newdow v. Bush, 355 F.Supp.2d 265, 269 (D.D.C. 2005).
[6] *Id.* at 271 (quotations omitted).

property, and enjoy any and every privilege that Jerry Falwell enjoys.

As Establishment Clause claims become more and more abstract, there is an increasing need to wring the specific intentions out of those ten totemic words that begin our Bill of Rights. Few disagree that the Founding history is the source for supplementing our understanding of the First Amendment, but this article does not launch once more into the breach of every letter, speech, declaration, riddle, or cocktail napkin vignette penned by Jefferson and Madison. That road is well worn and maddeningly forked.[7]As debating the views of these men towards religion and the State is unlikely to bring any new wisdom, it may be time to search for alternative sources of information on the Founding Era views of the Establishment and Free Exercise Clauses. Pennsylvania's founding and subsequent history offers valuable insight into the protection of minority religious rights as this was the Commonwealth's reason for being. This article reviews the Founding era beliefs and practices of Pennsylvania, a pluralistic refuge for a hodge-podge of religious minorities during the formation of the county that bears a closer resemblance to today's America than does any other colony.[8]

### B. How Religious Minorities Defined Establishmentarianism

Pennsylvania lacked an established religion. This does nothing, however, to advance an understanding of what an estab-

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[7] *See, e.g.*, Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers That History Doesn't Provide*, 2004 B.Y.U.L. Rev. 1617, 1618-19 (2004) (listing historical contradictions evident in interpreting the Establishment Clause, such as the fact that some States continued to fund official State churches after ratification while others desisted); *id.* at 1620 ("[T]here is no one history of religion in America. There are actually multiple histories").

[8] Some have argued that Rhode Island was the standard-bearer for religious tolerance. *See* ANSON PHELPS STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 207 (1950) (Pennsylvania's colonial government "was, next to that of Rhode Island, the most liberal from the standpoint of religion existing for any considerable period in colonial America"). Pennsylvania's much higher population, however, allows for a study of how comparatively larger religious factions lived together in a single colony.

lishment of religion is—a task begetting a slew of fractured and acrimonious Supreme Court opinions that often raise more questions than they answer. Judge Michael McConnell takes us one step further in defining an establishment as "the promotion and inculcation of a common set of beliefs through governmental authority . . . [It] may be narrow (focused on a particular set of beliefs) or broad (encompassing a certain range of opinion) . . . and it may be tolerant or intolerant of other views."[9] This description, however, also fails us. In Constitutional litigation, establishment is the anti-pornography—few people know it when they see it. To some, a Frosty the Snowman too dislocated from a crèche creates a noxious imposition of authoritative religion; to others it is an idyllic background for a winter walk through the town square. To truly define an establishment of religion, one needs to discover what it was that Pennsylvania sought to prevent and why.

Any guidance that could be gleaned from Pennsylvania's history and traditions will be especially helpful in evaluating the miasma of standards and quasi-standards used to evaluate unconstitutional establishmentarianism today. Is a neutrality standard closest to Pennsylvania's original understanding of establishment? If so, must government be only neutral between religions or neutral between religion and atheism? What is an excessive entanglement? Is the furtherance of religion in general a state interest? Pennsylvania's positions on these questions and what it means to be a second-class religious citizen are insightful and perhaps mark the outer limits of protection under the Establishment Clause. This article is not about the views of Quakers or Presbyterians alone, but the

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[9] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). I have omitted one last element of Judge McConnell's definition, that it be "more or less coercive," because coercion as it was understood in the colonial era is never an issue today. Modern cases often involve mere religious statements that may or may not be 'coercive' depending on the setting, the age of the listener, and the title or authority of the speaker. *See*, *e.g.*, Lee v. Weisman, 505 U.S. 577 (1992). The idea of criminal punishment for those who fail to attend church service, pay their tithe, or simply belong to the wrong denomination is completely foreign to even the most vicious caricatures of modern American evangelicals.

views of a colony that, at the time of ratification, resembled modern America's religious pluralism more than any other.[10]

The following part examines the religious philosophies of William Penn and how he put them into practice during the founding of Pennsylvania. It also tracks the history of Pennsylvania's governing charters and practices with an eye to what Penn was attempting to achieve. Part III examines the merger of religion and politics in colonial Pennsylvania. This merger is purportedly the theoretical worst-case scenario of establishmentarianism—where religious affiliation drives the power of government. Part IV of this article begins with a brief defense of original understanding, without which this article and all others reviewing the historical religious practices of the country are wasted ink. Finally, Part V takes the early Pennsylvanian philosophies, the most liberal on religion and government at the time of the Founding, and estimates how they would influence contemporary Establishment Clause controversies.

## II. PART II—Religious Establishment in Pennsylvania

### A. Colonial America—United By Geography, Divided By Religion

Contrary to the assumption that there is some universal original intent residing within the Constitution, views on religious establishmentarianism differed throughout the colonies. Even within each State, warring political and religious factions induced soap-operatic turmoil. For example, Maryland, originally founded as a haven for Roman Catholics by Cecil Calvert, soon saw the Glorious Revolution eliminate Catholics from public life.[11] The Church of England was quickly established and Catholics, including the founding families, were driven from office, barred from public worship and discriminatorily taxed.[12] Even Virginia, one of the most

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[10] *See* III.A. (describing Pennsylvania's multitude of competing religious sects).
[11] McConnell, *supra* note 9, at 2128.
[12] *Id*. at 2128-2129.

stridently establishmentarian colonies, saw the Great Awakening dramatically erode state support for the Church of England—but "as a result of evangelical religious revival," not secularism.[13] These two examples only illustrate the unstable relationship between church and State within even a single colony. No constitutional scholar could possibly draw conclusions from a homogenous treatment of religion during the colonial era without over-generalization.

Pennsylvania was a bit different. Like Maryland, it was founded as a refuge for dissenters and suffered some religious turmoil; however, its founding embedded religious toleration as an unquestionable public value which was maintained through the Constitutional debates. Pennsylvania avoided sharp religious and ethnic conflicts through alliances formed among the various religious groups. While some were more prominent, such as the Quakers, Presbyterians, and Anglicans, no one religion could establish a majority rule on its own, requiring the support of the smaller colonial religions such as the Reformed, Lutherans, Mennonites, Baptists and others.[14] The differing religious philosophies, when translated into politics, assured that the larger religious groups would only combine forces when absolutely necessary. Just as the phrase 'Peace Through Superior Firepower' appears self-contradictory to some, so was Pennsylvania's era of relative harmony maintained through a collection of distrusting and inapposite religious minorities.

### B. William Penn—Lesser Founder

Jurists and commentators, whether adherents to original understanding or not, have devoted incredible chunks of their collective lives probing the thoughts of "The Founders."[15] While this is

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[13] *Id.* at 2119.

[14] *See* III.B.1 (describing political alliances between various religions).

[15] *See* Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 Sup. Ct. Econ. Rev. 115, 117 (2004) ("Many constitutional scholars who do not consider themselves to be originalists nevertheless acknowledge that originalism provides the starting

a discrete and enumerated group that may be named and even ranked in order of influence, they are not the whole universe of those who have exerted great sway over American principles. While the Founders are credited with creating a country contrasting drastically with Europe's adherence to monarchy, State religions, and the disbelief in freedom as the conduit of virtue, their forerunners began the tradition of trying new forms of government when they first settled here. The Constitution was not a Big Bang of ideas as much as a collection of principles unpopular in Europe that were field-tested in America for over one hundred years. It is without derogation that the creators, proponents, or articulators of these early ideas should be called Lesser Founders and their influence has long been recognized. While not a revered philosopher, William Penn is one of these Lesser Founders who charged himself with putting the philosophies of representative government and religious toleration into practice. His contributions were indispensable to the Founders.

### 1. Rebel With a Cause

William Penn was a rabble-rouser, discontent with the official Anglican Church. His criticisms of the Church of England saw him expelled from Oxford University.[16] After relocating to France, he converted to Quakerism.[17] As a Quaker, he alternated his time between penning missives on the need for religious tolerance and spending months in jail as a result of them.[18] In 1668, his pamphlet, The Sandy Foundation Shaken, earned him prison time in the Tower of London where he continued to write critical literature.[19] In

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point of constitutional interpretation or at least is a factor to be considered among others.").

[16] Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. Pa. J. Const. L. 81, 90 (2001).

[17] *Id.* at 90. Another account has Penn converting to Quakerism while serving as a soldier in Ireland. WILLIAM DURLAND, WILLIAM PENN, JAMES MADISON, AND THE HISTORICAL CRISIS IN AMERICAN FEDERALISM 12 (The Edwin Mellen Press 2000).

[18] Gildin, *supra* note 16, at 90–91.

[19] JOSEPH J. KELLY, JR., PENNSYLVANIA, THE COLONIAL YEARS 11 (1980). His official conviction for criticizing Anglican religious practices was that he "denied the divinity of Christ and thus unbalanced the tenet of the Holy Trinity." *Id.*

a sense, Penn became a professional criminal, actively seeking arrest as a pretense to publicly challenge religious laws.

After being locked out of his Meeting House in 1670, Penn took to street preaching as a way to court arrest. Predictably, this incident earned him a return trip to jail." Penn intended to convert the trial into a publicity vehicle."[20] He flamboyantly challenged the judge's authority, demanding to know the charges against him, and using the opportunity to preach to the jury on the need for fundamental rights and the natural liberty of conscience.[21] The trial was not Penn's only turn as an amateur lawyer. His trial's jury members were fined and imprisoned for acquitting him.[22] Penn successfully defended them on appeal to the Court of Common Pleas, securing their release by convincing the bench that judges could not coerce juries into convictions.[23]

After his show-trial, Penn continued to build an arrest record by openly violating laws barring assemblies of more than five adults for religious worship outside of the state church,[24] writing pro-Quaker propaganda, and lobbying to get Quakers released from prison.[25] While his work targeted a slew of specific laws preserving the Church of England's monopoly on religious worship, such as legal oaths and legal declarations that equated religious dissent to sedition,[26] a common theme emerged: the separation of church from the State.

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[20] *Id.* at 12.
[21] *Id.* at 12–13.
[22] *Id.* at 13.
[23] *Id.*
[24] Gildin, *supra* note 16, at 91. England maintained the Conventicle Act, barring "secret" religious meetings. DURLAND, *supra* note 17, at 12.
[25] KELLEY, JR., *supra* note 19, at 14–15. Other charges included publishing without a secular license, "preaching to an unlawful, seditious and riotous assembly," and failure to take an oath of allegiance. DURLAND, *supra* note 17, at 12.
[26] Gildin, *supra* note 16, at 90–91.

**2. Penn's First Principles—The Governing Documents**

With a grant from the King, Penn sailed for his new land between Lord Calvert's property in the south and the Duke of York's lands to the north.[27] Frustrated, with a lack of progress in England, Penn hoped to create a sanctuary for religious dissenters; a "free colony for all mankind that will come hither."[28] The foremost feature of his new colony would be a fresh start without the European principles of coerced religious belief which had carried over to other American colonies. "I abhor two principles in religion and pity them that own them. The first is obedience to authority without conviction; and the other is destroying them that differ from me for God's sake."[29] Penn, although more of a theologian than a political scholar, was remarkably successful in building a government free of these burdens.

Pennsylvania's first rudimentary governing document was the 1676 West New Jersey Concessions.[30] This declared as policy one of Penn's key doctrines: "That no Men nor number of Men upon Earth hath power or Authority to rule over mens consciences in religious matters."[31] This is a much broader iteration of a separation of church and state than in current interpretations of the Free Exercise Clause; that, as a matter of natural law, government can never have authority over people's religious beliefs. Still wincing from his treatment in England, Penn tried to create a regime where religious adherents had complete autonomy.

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[27] John Blair Linn, Charter to William Penn and Laws of the Province of Pennsylvania Passed Between the Years 1682 and 1700 465 (1879).
[28] STOKES, *supra* note 8, at 206.
[29] *Id*. at 207.
[30] Gildin, *supra* note 16, at 93–94 (quoting 1 The Papers of William Penn 387--388 (Mary Maples Dunn & Richard S. Dunn eds., 1981)). ).
[31] *Id*. at 94 (quoting West New Jersey Concessions Ch. 16, *reprinted in* 1 THE PAPERS OF WILLIAM PENN 396–97 (Mary Maples Dunn & Richard S. Dunn eds., 1981)).While there is some question as to whether Penn actually wrote the Concessions, he was a signatory, and the declarations of religious freedom resemble much of his writings. *Id.*

> [N]o person or persons whatsoever within the said Province at any time or times hereafter shall be any waies upon any pretence whatsoever called in question or in the least punished or hurt either in Person Estate or Priviledge for the sake of his opinion, Judgment faith or worship towards God in matters of Religion but that all and every such person and persons may from time to time and at all times freely and fully have and enjoy his and their Judgments and the exercise of their consciences in matters of religious worship throughout all the said Province.[32]

The Concessions were the first of several governing documents that declared a nearly absolute protection for religious beliefs and practices, a fundamental Pennsylvanian value that continued through the colonial period and beyond the Revolution.

The temporary governing provisions of the Concessions were replaced in 1682 by the Fundamental Constitutions.[33] Its very first clause continued the theme of separating church and state: "[I]t is impossible that any people or government should ever prosper where men render not unto God that which is God's, as well as to Caesar that which is Caesar's…"[34] In other words, God gets your prayers and Government gets your taxes. Neither God nor Government gets both. Penn, however, did not see the withdrawal of government from the realm of personal faith as a mere safeguard against oppression, but as a way to increase the religiosity of the general population. To Penn, "religious obligation is not only preeminent to civic duty, but is a prerequisite to a successful civil order."[35] He believed that only religious liberty could induce the am-

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[32] *Id.*

[33] *Id.* at 95 (citing WILLIAM PENN AND THE FOUNDING OF PENNSYLVANIA 1680-1684: A DOCUMENTARY HISTORY 3–4 (Jean R. Soderlund et al. eds., 1983)).

[34] An Act for Freedom of Conscience (Dec. 7, 1682) *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 287 (Donald S. Lutz, ed.) (1998).

[35] Gildin, *supra* note 16, at 96.

bitious citizenry needed to risk crossing the Atlantic and endure the forested wilds of Pennsylvania.[36]

> [T]his unpeopled country can never be planted if there be not due encouragement given to sober people of all sorts to plant, and that they will not esteem anything a sufficient encouragement where they are not assured, but that after all the hazards of the sea and the troubles of a wilderness, the labor of their hands and sweat of their brows may be made the forfeit of their conscience, and they and their wives and children be ruined because they worship God in some different way from that which may be more generally owned.[37]

Penn's Holy Experiment involved "no established church, no tax-supported clergy, no tithe, no church courts."[38] Yet this was not a secular government by any means. "The purpose was to establish a Christian state based on Christian principles so that if those principles are true […], they must be the basis for the state."[39] Order and stability were not to be coerced by one preferred religion, but "depended upon virtuous citizens and religious institutions…instilling a morality originating in natural law, discoverable from reason, and confirmed by scripture."[40] This created an unusual arrangement where the secular government relied on independent religious institutions, regardless of their denominations, to maintain public order and morality. In other words, Penn's belief was that a

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[36] *See* KELLEY, JR., *supra* note 19, at 155 ("Indifferent churchgoers found some consolation in the belief hard work and industry was a Christian ethic.").

[37] Gildin, *supra* note 16, at 95–6 (citing WILLIAM PENN AND THE FOUNDING OF PENNSYLVANIA 1680-1684: A DOCUMENTARY HISTORY 98–9 (Jean R. Soderlund et al. eds., 1983)); *see also* William Penn, The Great Case of Liberty of Conscience (London, 1670), reprinted in CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION 17 (John J. Patrick & Gerald P. Long eds., Greenwood Press 1999) ("[W]e also believe such liberty protects a visible way of worship, a way of worship we believe to be required of us by God. If we neglect this worship for fear or favor of mortal man, we sin and are in danger of divine wrath.").

[38] FRANCIS GRAHAM LEE, ALL IMAGINABLE LIBERTY: THE RELIGIOUS LIBERTY CLAUSES OF THE FIRST AMENDMENT 33 (1995).

[39] DURLAND, *supra* note 17, at 20.

[40] LEE, *supra* note 38, at 33-4.

representative democracy could only survive if the populace were inculcated in religious values. The design was to "govern a secular political institution with religious values and attributes without replacing the secular superstructure."[41]

In that same year of 1682, Penn drafted the Pennsylvania Frame of Government and The Great Law in cooperation with settlers in Chester County.[42] The preamble was a dissertation on the somewhat circular relationship between God and Government. To Penn "government seems to me a part of religion itself, a thing sacred in its institution and end."[43] The role of law, according to Penn, was to punish those who strayed from religious prohibitions and caused harm to society. "[T]he law was not made for the righteous man; but for the disobedient and ungodly, for sinners, for unholy and prophane, for murderers….for them that defile themselves with mankind."[44] But government, although Penn may have seen it as a divine law enforcing institution, could not be guided directly by God. "[G]overnments rather depend upon men, than men upon governments. Let men be good, and that government cannot be bad; if it be ill, they will cure it. But if men be bad, let the government be never so good, they will endeavor to warp and spoil their turn."[45]

While a modern philosopher who mistrusts both government and the governed might turn towards libertarianism, Penn saw the last leg of this circle as religion. The freedom for each individual to forge an honest and uncoerced relationship with God through whichever religion they chose, thought Penn, was the best way to maintain virtue and order in society. With a stable society comes a stable government guided by honorable citizens who avoid overreaching and oppression. With these thoughts in mind, Penn

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[41] DURLAND, *supra* note 17, at 21.
[42] CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION, *supra* note 35, at 17; Linn, *supra* note 27, at 472.
[43] Linn, *supra* note 27, at 92.
[44] Lutz, *supra*, note 34 at 272.
[45] *Id.* at 274.

shielded anyone "who shall confess and acknowledge one Almighty God, to be the Creator, Upholder, and Ruler of the world,"[46] from being "molested or prejudiced for his, or her Conscientious persuasion or practice. Nor shall he or she at any time be compelled to frequent or maintain any religious worship, place, or Ministry whatever…"[47] The Great Law guarded religious freedom so zealously, that it even introduced the first American hate crime, punishing "any person [that] shall abuse or deride any other for his or her different persuasion and practice in matter of religion," branding them a "disturber of the peace."[48] His general views of the relationship between religion and government, however, were far more revolutionary—in Pennsylvania the promotion of religion furthered the compelling state interest in an orderly society and good government.

Penn declared religious freedom to be "the First Fundamental of the government of my country."[49] The only limits on this freedom were a belief in God and prohibitions on who may serve in office. While Penn's definition of blasphemy and the use of a Christian oath to hold office excluded Jews and atheists,[50] considering the times, Penn's vision was inclusive in not only accepting, but actively recruiting all orders of Christian minorities.[51] Despite the unequivocal benefits given to Christians, however, Jews and other non-Christians were still free to practice their religions as they wished. While outsiders in a political sense, Penn's belief in a natural right to practice the religion of one's choosing prohibited governmental interference with the practices of even disfavored relig-

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[46] Linn, *supra* note 27, at 102-103.
[47] *Id*. at 108.
[48] *Id*.
[49] Gildin, *supra* note 16, at 96.
[50] Great Law of Pennsylvania (1682), reprinted in ANNALS OF PENNSYLVANIA, FROM THE DISCOVERY OF THE DELAWARE 619–20 (Samuel Hazard ed., Philadelphia 1850), *reprinted in* CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION, *supra* note 35, at 18–9.
[51] Gildin, *supra* note 16, at 92 ("Because his ambition was to allow people from all religious backgrounds to practice as they believed was right, Penn aggressively recruited outside the Quaker faith.").

ions. The distrust of Jews participating in politics would eventually disappear. While Penn's Charter of Privileges of Pennsylvania, drafted in 1701,[52] included a Christian oath required for office holders,[53] as would the constitution of 1776, the bar on non-Christians holding office was dropped in the constitution of 1790.[54] One Pennsylvania historian attributes this as a reward for Philadelphia Jews who supported the Revolutionary War.[55]

Penn's views on religion and government were clear and his implementation of these views was uncompromising. Four basic principles on the relationship between God and Government can be discerned. First, there was a strict separation of church and state in that the state could never compel one to deviate from their own religious practices nor compel the financial support of other religions.[56] In Penn's view, forced beliefs were not genuine beliefs at all. Second, the free exercise of one's religion is subservient only to the most compelling of public interests in order and safety.[57] This protection was essential to guard against the more subtle erosion of religious liberties through purportedly neutral government action. Third, the state promotion of individual religious practice was essential to maintaining a virtuous and productive citizenry and thus maintaining the State interest in public order. In other words, religion reduces crime and boosts the economy. And lastly, while some feel that the best way to avoid an establishment of religion is to

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[52] CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION, *supra* note 37, at 22.

[53] Charter of Privileges of Pennsylvania (1701), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3080–1 (Francis N. Thorpe ed., 1909), *reprinted in* CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION, *supra* note 37, at 23.

[54] Gildin, *supra* note 16, at 107.

[55] STOKES, *supra* note 8, at 286-289.

[56] *Id.* at 207 ("He completely rejected the old theory of an established Church or any form of religious compulsion").

[57] Gildin, *supra* note 16, at 93 ("Consistent with his life's mission, Penn's Liberty of Conscience contemplated a regime much closer to the compelling interest standard—accepting that religious liberty would not be absolute so as to insulate conduct that threatened the state but otherwise demanding that civil obligations give way to an individual's religious duties.").

completely exile it from public life, Penn took the opposite tack.[58] Complete freedom of religious expression without any restraints on the individual, was the most productive route to avoiding a State religion. In the same vein that the cure for governmental propaganda is more speech, so it was with religion. By another analogy, religious factionalism would prevent the political rise of any clear, controlling sect attempting to muscle its views into governmental policy. "In this way [Penn] contributed much toward the secularizing of the American State, but he was no modern secularist."[59]

## III. The Politics and Populace of Pennsylvania

### A. The Idyllic Phase—Before the Revolutionary War

Pennsylvania was described as a "utopian holy experiment"[60] where all denominations of Christians were welcome. The experiment, while a personal quest by Penn, attracted attention even across the Atlantic. The Rabaut de Saint Etienne claimed "O nation of France, you are not made to receive an example, but to give it! If, however, you wish to imitate, imitate the Pennsylvanians. They make exception of nobody. Man, whatever his religious belief, has the right of enjoying all the sacred privileges that belong to mankind."[61] Immigrants, from both Europe and other States, heeded the call. By 1762, Pennsylvania had become a State so religiously fractured that no denomination could gain control of the government. The Church of England swam in the unfamiliar waters of minority status. Upon his arrival in November of 1762, Anglican Reverend Thomas Barton was astonished by what he found in Lancaster County. "[N]ot more than 500 can be reckoned as belonging to the Church of England. The rest are German Lutherans, Calvinists, Mennonites, Moravians, New Born, Dunkers, Presbyterians, Seceders, New Lights, Covenanters, Mountain Men, Brownists, In-

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[58] STOKES, *supra* note 8, at 207.
[59] *Id*.
[60] LEE, *supra* note 38, at 34.
[61] STOKES, *supra* note 8, at 207.

dependents, Papists, Quakers, Jews and so forth!"[62] Even though it was an island in a sea of its former victims, the Church of England was unmolested. "I have the satisfaction to assure the Society that my people…have continued to give proofs of that submission and obedience to civil liberty, which it is the glory of the Church of England to instill."[63]

Of course, while Penn's goal was to accommodate Christian refugees from several different faiths, the expectation of total harmony between them was a bit unrealistic. "The constitutional framework that guaranteed all Christians freedom of worship without interference from the government attracted so many new settlers of different backgrounds that the resulting multiethnic society put some strain on the principle of religious toleration."[64] Reverend Barton's "people" served as a prime example of the dangers faced by an anti-establishmentarian state that invites all comers, including those who did not share Penn's views on religion and government. Anglicans, once they arrived in Pennsylvania, sought to establish the Church of England and bar Quakers from holding public office.[65] This was a problematic pattern for adherents of Anglicanism, which had already abused religious toleration in Maryland and parts of New York to take power and depose the founding religions.[66] In fact, many of the victims of Anglican establishmentarianism elsewhere sought refuge in Pennsylvania,[67] where the Quakers led a coalition of disparate religious groups to politically resist the Anglican insurgency. "Baptists and Presbyterians in Pennsylvania

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[62] Letter to the Society for the Propagation of the Gospel by the Reverend Thomas Barton (Nov. 8, 1762), *in* 2 HISTORICAL COLLECTIONS RELATING TO THE AMERICAN COLONIAL CHURCH 366 (W.S. Perry ed., Hartford 1871), *reprinted in* CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION, *supra* note 37.

[63] *Id.*

[64] DENNIS B. DOWNEY & FRANCIS J. BREMER, A GUIDE TO THE HISTORY OF PENNSYLVANIA 70 (1993).

[65] Lee, *supra* note 38, at 34.

[66] *Id.*

[67] *Id.* at 35.

in the early eighteenth century preferred Quaker liberty to Anglican toleration."[68]

Aside from the willingness of the few larger religious groups to bind together in times of need, the lack of any governmental infrastructure supporting religion helped to defray the initial urge for immigrant groups, Anglicans and others, to establish their own religion in Pennsylvania. Ministers were held in low social status and often found it difficult to function in the large wilderness of the State. "Adapting to Pennsylvania conditions required time and a reorientation of the minister's role in church and society."[69] There was no government support for the clergy who became dependent on the laity for support.[70] Stripped of their prestige and financial support, Pennsylvania both suffered from a shortage of ministers and created a small class of more dedicated and effective clergy.

The few Pennsylvania ministers became "circuit riders who served many parishes…Traveling in all kinds of weather…ministers inspired their congregations by their piety and devotion."[71] The reward for these troubles was forging a strengthened bond with the laity and a freedom from governmental influence. "Religious liberty gave the church the opportunity to manage its own affairs free from governmental interference, and the clergy gained the independence to support or criticize the policies of the government."[72] In terms of the influence of religion on politics, however, withdrawal of government support was a wash. While the church was strengthened through a necessary shift to self-reliance, and it was free to opine on governmental policy as much or as little as it chose, the sheer number of flourishing religions resulted in a political stand-off. "In broad terms, Pennsylvania's religious heterogeneity demanded practical toleration. Few denomina-

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[68] *Id.*
[69] *Id.* at 35.
[70] *Id.* at 36.
[71] *Id.*
[72] *Id.* at 36-37.

tions, aside from Quakers and possibly Baptists, supported the principle of separation of church and state. On a practical level, however, since no denomination could expect to dominate, the autonomy of each depended upon working toleration for all."[73]

Religious frictions heated and cooled based on normal political issues like the economy, foreign affairs, and the infighting of Penn's family.[74] Conflicts routinely arose on matters of defense and crime. Quakers, dedicated to pacifism, staunchly opposed the bearing of arms or use of force by the State and constantly frustrated legislators of other denominations. In dealing with pirates and criminals, any solution "had to be offered subtly to avoid offending the Quakers, whose compassionate consciences were invitations to the lawless."[75] Deadlocks on these issues actually led to a dissolution of the legislature.[76]

The strong nexus between religious and political affiliations took its toll on the churches. By 1720, attendance was declining. Quakers were, "[l]ocked in word combat with the Anglicans. [M]eetings, it was said, degenerated into 'political caucuses.'"[77] The Quakers would continue to nettle their political opponents whenever England leaned on the Colonies for military support. During the French and Indian War, however, the internal pressures were relatively benign as any armed conflicts with American Indians were isolated to the reaches of the frontier.[78] These confrontations over power and religion were rarely bloody. Instead, they more closely resembled today's political controversies with hyperbole in the editorial pages and fiery stump speeches. Considering the practical realities of so many conflicting religions occupying the same

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[73] OWEN S. IRELAND, RELIGION, ETHNICITY AND POLITICS: RATIFYING THE CONSTITUTION IN PENNSYLVANIA 43 (1995).
[74] *See generally* KELLEY, JR., *supra* note 19, at 151–78.
[75] *Id.* at 144.
[76] *Id.* at 119.
[77] *Id.* at 154.
[78] *Id.* at 209.

territory, however, Penn's Holy Experiment appeared to be working well.

### B. The Revolution and the Merger of Religion and Politics

While the Quakers could afford to survive smaller crises with their pacifistic beliefs intact, the impact of the Revolution finally detonated the festering rivalries and distrust between the religious factions in the legislature. Matters of faith, however, were not the sole catalysts in the Revolutionary divide. Money, ethnic pride, expansion of the frontier, and the distribution of power also wedged Pennsylvania apart from the inside out.

#### 1. The Disparate Religious Impact of Money and Power

By 1776, the spiritual and political differences required a rancorous contest of religious alliances. The colony changed dramatically in both size and content.[79] "[S]hifting tides of immigration to colonial Pennsylvania…Indian ravages along the frontier during the early days of the French and Indian War, and the growing political consciousness of disfranchised groups" boiled over into the political arena.[80] Religion was at the heart of it all and was inflamed by the conversion of Penn's ancestors from Quakerism to Anglicanism.[81] While Reverend Barton's letter described many small factions, they quickly bound together based on religious similarities, geography, and economic/political status.

Philadelphia, Chester, and Bucks counties were the center of the colony. They were the home of Penn's ancestors and the influential moneyed class of merchants.[82] Quakers, although greatly outnumbered by the collection of other religious groups, maintained their political and financial dominance alongside the Episco-

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[79] *See* DOWNEY & BREMER, *supra* note 64, at 91 (During the Revolutionary period "the physical size of the commonwealth increased almost twofold, as the defeat of the Iroquois nation opened up new areas to settlement by Pennsylvanians of European descent.").
[80] ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 9 (1960).
[81] *Id*.
[82] *Id*. at 9-10.

palians and Baptists through strict naturalization and property qualifications for voting.[83] The middle counties made up the comparable middle-class of Philadelphia; mostly German Reformed or Lutheran farmers.[84] Their political allegiance was with the Quakers.[85] The Western frontier counties were the province of the relatively impoverished Scotch-Irish Presbyterians.[86] For the westerners that could vote, their counties were drastically under-represented in the State assembly, which was tilted to serve the commercial interests in Philadelphia.[87]

The end of the French and Indian War left the politically impotent frontier Presbyterians agitating for political change. The State assembly ignored their pleas for military aid, as the frontier families bore the casualties of American Indian attacks, partly due to the Quakers' repulsion to war and partly due to the disproportionately low representation for the Western counties.[88] The Quakers, Lutherans, and German Reformed resisted the aggressive lobbying for a more representative Presbyterian presence in the Assembly through the abandonment of the property qualifications.[89] The upstart Presbyterians, however, were put on the backburner as the Quakers pressed other political quarrels with the Anglicans.

The conversion of William Penn's descendants to the Anglican faith left the Quakers "alienated from the proprietors."[90] As retribution for their theological betrayal, the Quakers and Germans formed the Anti-Proprietary party and campaigned for taxation or

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[83] *Id.*at 10. *See also* DOWNEY & BREMER, *supra* note 64, at 70 ("Friends attained [an] increasingly disproportionate position of importance in Pennsylvania…").
[84] BRANNING, *supra* note 80, at 10.
[85] *Id.*
[86] *Id.* During 1776, the religious demographics appeared as follows: "Of 403 different congregations, 106 were German Reformed; 68 were Presbyterian; 63 were Lutherans; 61 Quakers; 33 Episcopalian; 27 Baptist; 14 Moravian; 13 Mennonites; 13 Dunker or German Baptist Brethren; 9 Roman Catholic; and 1 Dutch Reformed." STOKES, *supra* note 8, at 208.
[87] BRANNING, *supra* note 80, at 10.
[88] *Id.*
[89] *Id.*
[90] *Id.*

abolition of the proprietary estates passed down from Penn to his family.[91] The Anglicans retaliated by aligning with the disgruntled Presbyterians in the west and the moneyed Episcopalians in the east to form the Proprietary Party and change the issue to fair representation throughout the State.[92] With a complete political fracture along religious and geographic lines, and knives already drawn, the Revolution exploded into Philadelphia.

The prospect of war broke apart the already tenuous relationship among Pennsylvania's varied religious-political groups. "The majority of the Episcopalians, many of them leaders in the social, economic, and commercial life of the colony, were Loyalists and soon broke away from their alliance with the West. The Scotch-Irish in the frontier counties, in contrast, were almost unanimous in their support of the patriot cause."[93] The remnants of the Proprietary Party, fueled by a Revolutionary fervor, dominated the next elections.[94] Property ownership was abolished as a prerequisite for voting rights, reapportionment solidified the power of the western Presbyterians, and the Pennsylvania Assembly threw itself behind the war effort.[95] The most profound change, however, would be the virtual elimination of the Quakers from public life.

**2. Religion and War—Exclusion of the Quakers**

The Quaker religion abhors violent conflict, which made their place in the Revolution dangerous. "The [Quakers] were sympathetic with the desire of Americans to obtain redress of grievances, but most of them remained neutral so as to avoid all war-like measures."[96] While not compelled to fight the British against their

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[91] *Id*.
[92] *Id*.
[93] *Id*. at 11.
[94] *Id*.
[95] *Id*. at 12.
[96] STOKES, *supra* note 8, at 757; *see also*, IRELAND, *supra* note 73, at 221 (noting that the Quakers sent aid to Boston in 1774 when it was blockaded by the British in retaliation for the Boston Tea Party).

religious beliefs,[97] neutrality is not an enviable position to hold in a passionate war. Refusal to serve in the army or militia raised suspicions of allegiance to the King.[98] While the Quakers denounced the excesses of the King, they also refused to recognize "a revolutionary government established by extra-legal means."[99] The Quakers were not forced out of power, however, they abandoned their posts out of conscience.

In 1774 and early 1775, men from a wide range of ethnic and religious groups worked together to organize peaceful resistance to the British, but war and then independence shattered this collaboration. During 1775, virtually all Quakers, most of the German Sectarians, a portion of the Lutherans, and some Anglicans withdrew from political life, leaving control of the Revolution to the Presbyterian, the Reformed, and a smattering of others.[100] Deserted by many of their German Lutheran and Reformed political allies who joined the Revolutionary cause, the Quakers were left as a minority without a protective coalition.

The Test Act of 1777, passed with a leery eye towards Quakers and other suspected Tory sympathizers, required all citizens to appear before government officers and swear an oath to Pennsylvania and the United States—an oath that violated the Quaker religion.[101] "Quakers categorically refused compliances, as did most Mennonites, Schwenkfelders, Moravians, and other Sectarians. Many Lutherans remained ambivalent, cautious, and neutral as long as possible."[102] Although they largely avoided the labels of 'traitor' or 'loyalist,' the penalties for allegiance to their religious

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[97] "They provided the first considerable group of 'conscientious objectors,' in our history." STOKES, *supra* note 8, at 757.
[98] STOKES, *supra* note 8, at 757.
[99] BRANNING, *supra* note 80, at 11; IRELAND, *supra* note 73, at 221 (Quakers condemned the Continental Congress "for promoting 'Insurrections, Conspiracies & Illegal Assemblies' and expelled those who participated in organization against the Crown").
[100] IRELAND, *supra* note 73, at 218.
[101] *Id.* at 222.
[102] *Id.*

scruples over the new government were more than a social stigma. "[T]heir property was seized to pay for substitutes [to serve in the militia] or lost by their refusing to pay war taxes. They were also virtually shut out of teaching schools in Pennsylvania, for during the war the Assembly required a patriotic test oath of all teachers."[103] Many of the Quaker leaders were exiled into Virginia; those that remained were disenfranchised and double taxed, and the ruling government "interfered with the practice of their professions, the conduct of their schools, and the transfer of property to their heirs."[104] The Quakers, along with a handful of other pacifist sects, were sidelined from both the war and the concurrent political tumult.

### 3. The Revolutionary Constitution of 1776

For the prevailing Proprietary Party, capture of the legislature was not enough. A new constitutional committee was called to replace the Charter of Privileges, originally established by Penn in 1701.[105] Even drunk with power and distrustful of the ousted Quakers, the drafters of the Constitution of 1776 focused more on supporting the American Revolution and solidifying their own power than altering the religious freedoms originally established by Penn. The new constitution "opened with a preamble abjuring allegiance to the British Crown," established a "lengthy bill of rights [that] set forth Whig sentiments similar to those expressed in the Declaration of Independence . . . continued the unicameral legislature that had been established under the Charter of Privileges" and appointed officers to the Continental Congress.[106] The property requirements for voting were abolished while all those otherwise qualified citizens "suspected or publicly denounced as enemies to the liberties of America" were excluded from the polls.[107] They even availed them-

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[103] STOKES, *supra* note 8, at 757.
[104] IRELAND, *supra* note 73, at 44.
[105] BRANNING, *supra* note 80, at 12.
[106] *Id.* at 14.
[107] *Id.* at 11- 12.

selves of the timeless perk of reapportioning legislative representation to their benefit.[108]

This was the Revolutionary Constitution; it "mark[ed] the culmination of a political movement that ousted from control the upper-class eastern leadership which had dominated in colonial affairs."[109] Despite the fierce political disputes, and the rare taste of power by the Presbyterian coalition, the Charter of Privileges' religious protections were untouched: "It established no religious test for voting, but members of the Assembly were required to declare a belief in one God and in the inspiration of the Scriptures."[110] The estranged Quakers and their remaining allies held massive protest meetings in Philadelphia and, led by John Dickinson, adopted a series of resolutions condemning the new constitution for its lack of popular ratification.[111] However, to the Quakers, an erosion of protection for religious beliefs was not a prominent issue despite the Test Act and war taxes. Although religion was a factor, the Presbyterian revenge was driven more by economic class warfare, ethnic identity, geography, and the Revolutionary War.[112]

**4. The Ratification Debates in Pennsylvania—The Proxy Wars**

Attesting to the volatile nature of politics and religion, the alliances that crafted the Pennsylvania constitution of 1776 would last only a few years, detonated by the federal ratification debates. The former unions were recast along the national Federalist/Anti-Federalist lines. By 1778, the Anglicans joined with the traditional Quaker bloc[113] as the Republican Party. The Presbyterians, who now substantially controlled the State Assembly, joined with the Reformed to oppose the federal Constitution under, ironically, the

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[108] *Id.* at 11.
[109] *Id.* at 9.
[110] *Id.*
[111] *Id.* at 16.
[112] *See id.* at 17.
[113] Absent the Reformed, the Quakers continued their alliance with the German Sectarians and Lutherans. IRELAND, *supra* note 73, at 39.

moniker of the Constitutionalist Party.[114] So the two sides took to the presses, jockeying for positions on the State's ratification convention delegation. What followed was a war of words over Pennsylvania's say in the fate of the federal Constitution. Religious establishmentarianism was purportedly at stake.

The Presbyterians appeared to have fired the first shot. An anonymous essayist, "An Old Constitutionalist," warned his fellow Presbyterians that early support for a strong federal Constitution meant that "their overthrow seems almost unanimously to be determined upon by all the different religious, or other sects in this country."[115] Although the exchanges by political essayists "seldom attacked identifiable religious groups"[116] the specter of a federal establishment was often used to spur fears of religious domination by distant and powerful sects of zealots or atheists. "[L]iberty of conscience, which was an important issue in Pennsylvania, promised significant electoral rewards and hence drew frequent attention in the Antifederalist literature."[117]

The Antifederalist/Constitutionalist essayists rhetorically terrorized the religious sensitivities of the Quakers, whom they believed to be swing voters.[118] The writer "An Old Wig V" attacked a strong centralized government as

> open[ing] the door for a 'zealot' to create a religious establishment, enforce religious orthodoxy, and use the taxing and military power of the central government to "invade the rights of conscience." With a special eye on the pacifist Quakers and German Sectarians, the essay threatened that those "conscientiously scrupulous of

[114] *Id.* at 39, 218.
[115] *Id.* at 6-7.
[116] *Id.* at 41.
[117] *Id.* at 43.
[118] *Id.* at 45.

> bearing arms" might be "dragged like a Prussian soldier to the camp."[119]

Essayist Philadelphiensis went a step further, warning that the religiously abolitionist Quakers would be pressed into military service in order to quell slave rebellions.[120]

The emerging deists were another constitutional bogeyman. 'Unitarian' claimed that efforts to craft a strong federal government were a pretext for a pending takeover by Deists, meaning "that there is not the least security for the Christian religion."[121] "'James de Caldonia' linked Deism and social pretensions" and admonished that a strong central government would allow "a pagan, deist, or any other gentleman [to] hold any office . . . ."[122] 'Aristocrotis' harangued that deism "'admits of proper degrees of distinctions amongst mankind' in ways impossible under Christianity with its 'commands to call no man upon earth master or lord.'"[123] Thus, the aristocratic Deists would "expung[e] religion from government . . . because it was incompatible with 'gentleman [sic] of fashion or good breeding . . . genteel amusement and fashionable accomplishment.'"[124]

When the Antifederalists were not decrying the exile of religion from government, they warned of too rich a mixture between the two. Philadelphiensis claimed that proponents of a federal Constitution sought "to compel the whole continent to conform to their own" religions, which was presumed to be Anglican or Episcopal.[125] 'A Baptist' claimed to have inside information that the "Federalists conspired to establish the Episcopal religion with its bishops and its compulsory tithes."[126] Insults were thrown at Anglicans as

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[119] *Id.* at 43-44.
[120] *Id.* at 44.
[121] *Id.*
[122] *Id.* at 112.
[123] *Id.*
[124] *Id.* at 125.
[125] *Id.* at 121.
[126] *Id.* at 121.

well as at groups having little or no presence in Pennsylvania, such as Jews, Scots, Turks, and Jesuits.[127] Though the Anti-federalist tactics inconsistently swung between claims of religious establishment and religious exile, they consistently tried to link Federalism with religious oppression.[128]

The Quakers aligned with the Federalists who "consistently projected an image of religious neutrality, possibly indifference."[129] Warnings of religious servitude rang hollow; "Anti-federalist depiction of the horrors of Federal limits on state sovereignty carried fewer negative connotations to those who had suffered at the hands of state government."[130] The Pennsylvania Federalists "generally avoided references to religious or ethnic groups, and seldom relied on religious imagery, scriptural citations, or familiar biblical words or phrases."[131] The more respectful and religiously benign approach of the Federalists "comported well with local political mores" and helped them build a coalition across religious lines.[132] It was through a clean campaign and the *avoidance* of discussing establishmentarianism that Federalists grabbed a landslide victory in the 1787 election of representatives to the ratifying convention,[133] where Pennsylvania became the second State to ratify the United States Constitution.[134]

The rancor continued through the ratifying convention and even afterwards, as Anti-federalists tried to undermine adherence to the federal Constitution,[135] but the cause was eventually lost. Religion was both a central issue and a proxy in these debates. The Presbyterians did not fear either a theocracy or a purely secular central government orchestrated by Deists. Their true motivations were

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[127] *Id*. at 119-120.
[128] *Id*. at 121.
[129] *Id*. at 119.
[130] *Id*. at 228.
[131] *Id*. at 119.
[132] *Id*.
[133] *Id*. at 69.
[134] 1 U.S.C. LXII n.12 (2000) (listing ratification dates).
[135] *See* BRANNING, *supra* note 80, at 96.

avoiding the ultimate repudiation of Pennsylvania's unicameral legislature with its annual elections, which now looked antiquated compared to the new federal model of government. This incredibly representative and unrestrained construction allowed them to keep control of the Assembly and rule with very little restraint.[136] Despite the self-interested use of the ratification debates as a front for defending the structural source of their Anti-Federalist power, Pennsylvania Anti-federalist Robert Whitehall did propose a series of amendments to the federal Constitution that sound very familiar today: freedom of speech and of the press, trial by jury, the right to bear arms, and the inability of the federal government to interfere with protections of religious liberty.[137]

The Federalists, however, were not interested in a cynical lesson on protections from federal abuse. They sought "any central authority capable of limiting state freedom of action" and providing "external protection from the vagaries of state politics."[138] Quakers and their kindred religious outcasts wanted a check on a state government that, with a weak executive branch and hyper-representative legislature, came too close to mob rule. In this sense, the real debate evolved around the relative strengths of a central government versus the state—not religion. Religious minorities sought a less representative government that was immune to fever passion; the dominant Presbyterians saw a more democratic State government as the cure for aristocratic control.[139] "Pennsylvanians divided over the Federal Constitution not because it enhanced the powers of the central government, but rather because it did so in ways that promised to alter the balance of political power within Pennsylvania."[140]

Yet the previous religious quarrels shaded and informed political motivations more powerfully than geography or class. An-

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[136] IRELAND, *supra* note 73, at 11-12.
[137] *Id.* at 97.
[138] *Id.* at 229.
[139] *Id.* at 41-43.
[140] *Id.* at 256.

glicans sought revenge for the sack of the "Anglican-controlled College of Philadelphia" and establishment of "the Presbyterian-dominated University of Pennsylvania."[141] Quakers and their collection of smaller sects still stung from the Test Acts. Although "[p]olitical splits were not clear-cut," the alignment between religions and parties was substantial. Many of the Republican leaders, such as Thomas Mifflin, Gouvernour Morris, and George Clymer were Anglicans with strong Quaker ties,[142] evincing a superior ability to bring religious adherents together into coalitions. These religious affiliations even exceeded the natural coagulation of political views along class lines.[143] As a whole, "Pennsylvanians responded to the proposed federal Constitution largely on the basis of political attachments rooted in ethnic-religious identities nurtured by a decade or more of bitter partisan warfare"[144]

The ratification of the federal Constitution produced a reconciliation of sorts. Philadelphia, divested of its Tory business leaders who had fled home to England and pock-marked by the war for independence, saw a counter-revolution.[145] Between 1780 and 1790, "Lutherans, Sectarians, and Quakers gradually rejoined the political community and supported the Republicans, finally ending the rule of the Constitutionalists."[146] The restored groups worked to replace the Revolutionary Constitution of 1776, and most importantly, modify the Test Act.[147]

Passing on the opportunity for revenge against their religious opponents, the Republicans ensured that the Constitution of 1790 maintained detailed and even redundant protections. It reaffirmed the declaration from the Constitution of 1776 that "all men have a natural and indefeasible right to worship Almighty God ac-

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[141] *Id.* at 39, 237.
[142] *Id.* at 165-167, 259.
[143] *Id.* at 178.
[144] *Id.* at 256.
[145] BRANNING, *supra* note 90, at 17.
[146] IRELAND, *supra* note 73, at 218.
[147] *Id.* at 225-227.

cording to the dictates of their own consciences;"[148] This was broken down into a number of specific rights: (1) "no man can by right can be compelled to attend . . . any place of worship;" (2) "erect or support any place of worship, or to maintain any ministry, against his consent;" (3) "no human authority can, in any case whatever, controul or interfere with the rights of conscience;" and (4) "that no preference shall ever be given, by law, to any religious establishments or modes of worship."[149] The most significant expansions of religious inclusion were the elimination of the requirement that office holders swear an oath to the Old and New Testaments, and of the clause stating that all those "who acknowledge[ ] the being of God" would be protected against a loss of "any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship."[150]

There were still fireworks, as the Constitutionalists attempted to paint the Republicans as traitors loyal to the King.[151] The Republicans responded that the Test Acts were merely the "engines of a ruling party, to entrap and punish such people as they suppose inimical to themselves . . . crazy with religious bigotry and political rage."[152] But without bloodshed or prolonged campaigns the new Constitution of 1790 was installed, largely resembling the proposed U.S. Constitution. Complete with a Governor, and most importantly, a bicameral legislature,[153] the targets of religious abuse and domination believed that they had all of the protection needed to continue Penn's Holy Experiment.

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[148] Pa. Const. of 1790, Artart. IX, § 3.
[149] *Id.*
[150] Gildin, *supra* note 16, at 107–08 (quoting Pa. Const. of 1790, art. IX, § 3). Public office remained the exclusive domain of the religious. *See* Pa. Const. of 1790, art. IX, § 4 ("That no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.").
[151] IRELAND, *supra* note 73, at 227.
[152] *Id.*
[153] BRANNING, *supra* note 80, at 17.

## IV. The Usefulness and Propriety of Original Understanding

### A. The Basic Philosophy of Interpretation

While the collective notions of one colony-turned-State-turned-Commonwealth may not square exactly with the Framers' true intentions behind the Establishment Clause (or behind drafting a Constitution without what was to become the Establishment Clause) or what the ratifiers originally understood the Establishment Clause to mean, Pennsylvania's colonial views and its ratification debates can aid in the search for the original understanding of establishmentarianism. Identifying the principal problems to be vanquished, unifying philosophies, or practices that were either retained or discarded upon ratification provides objective guidance, even if we can never agree on the 'one true meaning' behind any clause of the Constitution.[154] This article presupposes that the best way to interpret the Establishment Clause, given its skeletal and terse prohibitions, is to explore the original understanding of the Constitutional text as developed by the practices and customs of the time in pursuit of concrete values and objective meanings.[155] This is most commonly done by examining the generally accepted meaning of the words of the Constitution itself, extra-textual writings by individual Founders, such as the Federalist Papers or individual letters by the Founders, the debates of the Constitutional Convention, and an analysis of the existing common law at the time.

An originalist approach, whether through a search for original intent or original understanding, includes many of the same problems inherent in using legislative history—the lack of explicit agreement among the Founders or the populace, omission of important details or use of vague words due to compromise, and the fact that individual interpretations by the drafters, ratifying delegates, or essayists were never considered and ratified by the

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[154] *See* Barnett, *supra* note 15, at 119.

[155] *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611, 620 (1999) (describing the quest for the original public meaning as "what the ratifiers understood themselves to be enacting [which] must be taken to be what the public of that time would have understood the words to mean . . .").

States. Despite these shortcomings, resort to extra-textual writings holds such prominence that the phrase "Wall of separation between church and state," which has arguably eclipsed the actual wording of the First Amendment in both law and public opinion, was merely a metaphor stolen from one of Jefferson's letters written when he was President. While relying on one person's view of the Constitution can be as loaded as relying on one legislator's view of a statute, this is a matter of incomplete execution, not necessarily a poor methodology. A more inclusive examination of dictionaries of the time, extra-textual writings and contemporaneous practices, while turning up scores of contradictions and ambiguities, can allow for a more representative pattern of what the Pennsylvanians, with their unique views of establishmentarianism, thought they were buying into when they agreed to ratify without an explicit Constitutional talisman against established religions.

### B. Clearly the Best of the Bad

Originalism in any form is not a universally adored method of interpretation; it is, however, the most neutral and objective method available. In fact, only when compared to other methods of reading the Establishment Clause does originalism truly look viable. The Evolving/Living Constitution approach, which equivocates between denying that any conclusions can be drawn from history and denying that any clear historical conclusions are relevant, believes that the Constitution should simply be re-interpreted to achieve socially desirable goals in step with the moral tenor of the day. For example, Professor Steven Gey urges courts to ignore the words and history of the Establishment Clause in favor of "constitutional interpretation in light of an active and vibrant religious reality rather than a static and uniform religious history."[156] While this is a soothing articulation of 'dead hand bad; progressive good,' the actual implementation of this approach is anything but soothing.

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[156] Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers That History Doesn't Provide*, 2004 B.Y.U. L. Rev. 1617, 1630 (2004).

Professor Steven Shiffrin provides an exposition of the standardless standard that is a Living Constitution interpretation of the Establishment Clause. First, "draw upon an eclectic mix of resources," including the usual American history and traditions along with the work of "political theorists and commentators."[157] Second, balance the values expressed in our cornucopia of resources – sometimes. "[B]alancing or prudential judgment concerning multiple values in a variety of concrete contexts is unavoidable. By this I do not mean to suggest that ad hoc balancing is always appropriate."[158] And lastly, temper the conclusions to "produce insights that comfortably fit within our evolving traditions."[159] Remember, "[i]n the end, there is no substitute for practical reason."[160] So, to paraphrase Professor Shiffrin's approach, ignore the original intent of the Founders and understanding of the Constitutional text, but consider it (to the extent one exists); reject formulas and tests for a balancing of multiple variables, except when this is inappropriate; and all the while, consider "how the world actually works" in crafting "the best theory."[161] Like an epistemological hamster in a wheel, this approach entails an awful lot of effort in going nowhere.

Professor Shiffrin, and those who agree with this approach, will be bogged down in disputes over all of the aforementioned considerations as they effectively design from scratch what a religion clause should be, not interpreting what our First Amendment actually requires. Religious freedoms and restrictions cannot hang on an amorphous matrix of balancing tests and soft guidelines crafted only to exclude any views held by "a group of eighteenth

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[157] Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 Cornell L. Rev. 9, 14 (2004).
[158] *Id.* at 15.
[159] *Id.*; *see also* New Webster's Dictionary and Thesaurus 329 (1992) (evolve - "to change continuously from the simple to more complex"; "to cause to unfold or develop"); *id.* at 1046 (tradition – "a convention established by constant practice"); *id.* at 718 (oxymoron – "figure of speech in which apparently contradictory terms are combined to produce an epigrammatic effect.").
[160] Shiffrin, *supra* note 157, at 15.
[161] *Id.* at 14-15.

century white male agrarian slaveholders"[162] deemed insufficiently 'progressive.' After all, even if there was no dispute about the meaning of the Constitution, to Professor Shiffrin, it would not likely "have a lot to recommend it."[163] The necessity of law to have objectively discerned rules, finality, and predictability, however, eliminates such arbitrary approaches to Constitutional interpretation.[164] In this sense, originalism is an anti-theory in that it is the only viable approach remaining.

### C. The Loaded History of Pennsylvania

This article is, in some sense, a hypocritical effort. Part IV.A criticizes over-reliance on a single point of view in seeking the original understanding as a "loaded" practice. This is exactly what a review of Pennsylvania's founding philosophies does—assign significance to one distinct point of view. It is also acknowledged that offering the views of one-thirteenth of our original Union as an effective guide to the Establishment Clause is a hard sell to any school of interpretation. For the followers of originalism, not only is it too circumscribed in scope, but Pennsylvania lacks the gravitas of a celebrity Founder like Jefferson or Madison. For adherents to the Living Constitution theory, these views will be accepted or rejected depending on their ultimate conclusions.

But the history of Pennsylvania offers a nice compromise—an objectively discernable code of values and practices for a religiously diverse population that was deemed compatible with the Constitution at the time of ratification. In other words, it is a view of Founding era establishmentarianism from a State that prided itself on disestablishmentarianism. This examination of minority rights from the minority's point of view is perhaps the most 'progressive'

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[162] *Id.* at 14.

[163] *Id.*

[164] *See* Barnett, *supra* note 15, at 119-120 ("Hence, originalism is justified because we, right here and right now, are or profess to be committed to a written constitution to help ensure that those who make, enforce, and interpret the law are subject to rules that they cannot change on their own. And for this to be accomplished, the meaning of a written constitution should remain the same until it is properly changed.").

version of originalism that one can offer. It may also be the most compatible with a modern America that, while still a Christian nation by demographics, now contains myriad religions and religious practices that where either never encountered by the Founding generation or discounted as belonging to distant parts of the world.[165] While the preceding history shows a diverging and disorganized view of Pennsylvania's understanding of ratification, there are patterns in the static—a set of loose principles elucidated by the collective politicians and pamphleteers which can guide the contemporary Republic. Considering Pennsylvania's history, the reason for its founding, and enduring commitment to religious liberties, it was the most religiously liberal colony to ratify the Constitution. It is the thesis of this article that Pennsylvania's views on religious establishmentarianism represent the most protective interpretation possible under the principles of originalism and its historic practices should be given some increased weight or at least additional scrutiny when defining the outer limits of the Establishment Clause today. The following part examines what conclusions can be drawn from the history and practices of colonial Pennsylvania and how they compare with modern First Amendment jurisprudence.

## V. Establishment in The Quaker State and Establishment Today

The history and traditions of Pennsylvania regarding established religions expose a number of very different establishmentarianism maxims than the Supreme Court recognizes today. Even under Pennsylvania's fear of government control and liberal approach to religious freedom, the Establishment Clause appears far more limited than modern views that result in Justices dictating ratios of crèches to menorahs to Santas. What follows are colonial Pennsylvania's five maxims of establishmentarianism.

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[165] *See*, DOWNEY & BREMER, *supra* note 64, at 57 (discussing the relatively rich diversity of religion and ethnicity in Pennsylvania, New York, and New Jersey).

### A. There is a State Interest in Religious Entanglements

No single statement sums up William Penn's philosophy on the intersection of religion and government better than, "religious obligation is not only preeminent to civic duty, but is a prerequisite to a successful civil order."[166] Penn believed that a religious populace serves the public interest by living productive lives and preserving the social order. To argue otherwise, by using Penn's many warnings against the merger of God and Caesar as support for the "Wall of Separation" theory, is a mistake. No members of the State in Penn's time could take their offices without pronouncing their belief in the Almighty.[167] If this concept of establishmentarianism was applied to modern Constitutional law, it would obliterate the long-standing mandate that government should avoid "an excessive . . . entanglement with religion."[168] Of course, the trick is how, exactly, could a modern government entangle itself with religion under Penn's principles?

#### 1. Entanglement on the Cheap—No Money Means No Money

The key to Penn's philosophy is not State avoidance of religious entanglements, but the ways in which it entangles itself. Penn set forth two golden rules. The first was no official compulsion to practice a specific denomination of Christianity. To Penn natural law simply divested the government of powers over an individual's conscience and beliefs. The second rule was that public funds were prohibited from being used for religious purposes. While it is unclear whether this was meant as a prophylactic measure to prevent a denomination from becoming powerful enough to establish itself as the State religion, Penn most likely thought the practice of forced

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[166] Gildin, *supra* note 16, at 96.

[167] *See*, Great Law of Pennsylvania, *supra* note 50, at 19 (Penn's Great Law required all public officials to "profess and declare they believe in Jesus Christ to be the Son of God, and Savior of the world."); Pa. Const. of 1790 art. IX, § 4 (restricting public office to those who "acknowledge[ ] the being of a God and a future state of rewards and punishments").

[168] Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 674 (1970).

tithes was a repulsive violation of individual religious autonomy.[169] Therefore the Court in *Walz* is incorrect in stating that evaluation of religious entanglements is "inescapably one of degree."[170] To colonial Pennsylvanians, religious entanglements were necessary, with the exception of State financial support. *Walz*, which upheld property tax exemptions for churches,[171] conflicts with this principle. No money means no money.

Initially, this may seem like an especially useless formulation. How can a government entangle itself with religion while keeping its checkbook in its pocket? First, instances where government funds reach religious institutions through the personal choices of individual recipients, such as in *Zelman v. Simmons-Harris*,[172] would likely be allowed. While Penn might be wary of the somewhat superficial distinction of severing money's tie to government by introducing a private middle man, the option endorsed by the dissent in *Zelman* is clearly the greater of two evils. *Zelman* upheld the use of State scholarships to Cleveland's poorest students, which could then be used at any private school, secular or religious, the recipient chose.[173] To the dissenters, however, any money that came from the government shall always remain government money.[174] That the government may bar the religious use of its funds even after distribution to private individuals starkly conflicts with Penn's belief that the State lacks power over citizens' religious choices. While the State may be forced to choose between its money and its collective beliefs regarding religion, an individual may not.

Aside from allowances for personal choice in spending what was originally government money, Pennsylvania's prohibition would have changed the outcome of several cases involving fund-

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[169] *See* Linn, *supra* note 27, at 107-108.
[170] Walz, 397 U.S. at 674.
[171] *Id*. at 674-678.
[172] 536 U.S. 639, 652 (2002).
[173] *Id*. at 644-645.
[174] *See id*. at 684-685 (Stevens, J., dissenting) (referring to the scholarships as "public funds" and "state expense").

ing for religious groups or purposes.[175] Viewing colonial Pennsylvania's society as the most analogous to our own, the current allowance of tax breaks for churches violates the *sine qua non* of anti-establishment protections—tax dollars for religion. Even the use of Congressional chaplains and opening governmental functions with a prayer could be endangered. While some of these prohibitions on expenditures could seriously disadvantage religious people, or even amount to outright discrimination, they outweigh the alternative, forcing individuals to redistribute their dollars towards religions they do not practice. In the end, denying religion the sustenance of government funds was believed to ultimately make individual beliefs stronger and the church less corrupt.

### 2. All Religions are Equally Good, But Atheists Need Not Apply

One way Pennsylvania entangled itself with religion was with its principle that the State may, without the use of government funds, advocate the importance of religion in general as a public interest and rhetorically prefer religion over atheism. With these rules in place, a State is left, essentially, with the modern doctrine of neutrality among Judeo-Christian religions. In Pennsylvania, religious institutions as a whole were strongly supported in principle, even without financial aid.[176] Non-Christians were prohibited from holding public office throughout the colonial era and under the more liberal, amended constitution of 1790, were only required to believe in God.[177] Atheists, on the other hand, had no protections under the Pennsylvania constitution.[178] There is no evidence that they were forced to choose a religion; rather their beliefs (or lack thereof) cost them only the right to hold public office and vote. Ad-

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[175] *See*, *e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (allowing educational tax deductions for parents sending children to private religious schools); Bowen v. Kendrick, 487 U.S. 589 (1988) (allowing federal grants to religious groups for counseling services as the primary effect was not to advance religion); Everson v. Bd. of Educ. of Ewing Township, 330 U.S. 1 (1947) (reimbursement of bus transportation expenses for children attending religious schools).

[176] *See* CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION, *supra* note 35, at 38.

[177] *See* Gildin, *supra* note 16, at 108 (Jews were allowed to hold public office under the 1790 Constitution, but a belief in God and the afterlife was still required).

[178] CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION, *supra* note 37, at 38–39.

herents to non-Judeo-Christian religions, such as American Indians, were not denied religious rights either, due to the necessity of instilling virtue vital to public order. With the legal exclusion of atheists and State support of religious values, one historian summarized the essential characteristics of Pennsylvania as "appear[ing] to be more like a theocracy but without the usual use of coercive force to authoritatively police it."[179]

To illustrate the sharp break with current Establishment Clause doctrine, the Pennsylvania view would reverse nearly all cases concerning a pubic display of the Ten Commandments or other religious symbols. For example, in *Indiana Civil Liberties Union v. O'Bannon*,[180] the Seventh Circuit upheld the grant of a preliminary injunction against posting the Commandments on State property, citing the well-worn prohibition against the State display of anything that advances religion.[181] Under Penn's view, however, promoting religion in a way that avoids expending State funds or endorsing a specific Judeo-Christian denomination was essential to furthering the State's interest in crime control, economic productivity, and general morals. This history of using religion to further State interests has been explicitly disavowed by the Supreme Court:

> Posting of religious texts on the wall serves no educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.[182]

To the contrary, no matter how desirable it may be today to separate the Commandments from the classroom, this prohibition

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[179] DURLAND, *supra* note 17, at 21.
[180] 259 F.3d 766 (7th Cir. 2001).
[181] *Id.* at 771, 772.
[182] Stone v. Graham, 449 U.S. 39, 42 (1980).

appears to be inconsistent with the role of religion at the time of ratification in Pennsylvania. Posting privately acquired monuments such as the Ten Commandments on public property would be a nearly perfect example of how government should interact with religion under Pennsylvania's views of disestablishmentarianism: preference for religion over atheism, but neutrality among religions.

The purported obligation that government must avoid discrimination between religion and atheism is relatively new. It was not so long ago that Justice Douglas, writing for the Supreme Court, declared that "[w]e are a religious people whose institutions presuppose a Supreme Being."[183] Only within the past few decades have the Court and commentators demanded equal time for atheists because the Constitution, suddenly, commands it.[184] In *Wallace v. Jaffree* the Court, recognized a right to atheistic equality, stating, in dicta, that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."[185] This language asserts the relatively benign principle that government cannot force non-believers to believe, a principle endorsed by Penn. In marked contrast from Penn's principle is Justice O'Connor's view that the Establishment Clause protects the bruised sensitivities of atheists. To Justice O'Connor, a public display of religion "sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored

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[183] Zorach v. Clauson, 343 U.S. 306, 313 (1952); *See also* Church of the Holy Trinity v. United States, 143 U.S. 457, 465, 471 (1892) ("this is a religious people;" "this is a Christian nation.");

[184] *See*, *e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion"); City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) ("Th[e] governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment"); Lee v. Weisman, 505 U.S. 577 (1992) (Blackmun, J., concurring) ("the [Establishment] Clause applies 'to each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker.' Such is the settled law.") (quoting School Dist. of Abington v. Schempp, 374 U.S. 203, 319-20 (1963) (Stewart, J., dissenting).

[185] 472 U.S. 38, 52-53 (1985).

members of the political community."[186] Yet, as Penn's philosophy and the religious test clause in the Pennsylvania Constitution of 1790 show, this is a message that was intended to survive ratification. To believe otherwise would require a dramatic reversal in Pennsylvania's longstanding practices at the time of ratification—a reversal that neither occurred nor drew public debate.

The atheist-as-equals line of cases and commentary does not stop at the notion that the Constitution protects the right to not believe. Professor Kathleen Sullivan, for instance, believes that, after all these years, Americans have simply forgotten that this country was founded on an *aversion* to religious beliefs.[187] According to her reading of the Constitution, the Establishment Clause was drafted to mandate "official agnosticism . . . requir[ing] not only even-handed government treatment of private religious groups, but also a standing gag order on government's own speech and symbolism; it prohibits official partiality toward religion."[188] Regardless of the desirability of an atheist nation, Professor Sullivan reads from a Constitution that would be less than sixty years old. In crafting its own constitution and ratifying the federal Constitution, Pennsylvania's expansive freedoms never stretched so far as to adopt anti-religion as its guiding light. The long-standing history of excluding atheists from political life, the open animosity towards their purported values, and the religious grounding that Pennsylvanians believed was necessary to be a good citizen, proves that any claim that atheists stand on equal ground or that atheism was officially endorsed by the Establishment Clause is completely divorced from the history of Pennsylvania.

### 3. Entangling Public Policy and Religion

Another festering debate over the Establishment Clause is the loose campaign to reduce the influence of religion on public policy. Building on the assertion that the Constitution *requires* America

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[186] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) O'Connor, J., concurring).
[187] Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 206 (1992).
[188] *Id.*.

to be an atheist nation, some advocates go one step further—barring any religious contributions to the law. According to Professor Gey:

> My main reservations about Professor Esbeck's conclusions pertain to his connection that, based on the country's early history, it should be permissible for the government to use religion as the basis for the formation of public policy and legal rules. It is one thing to insist that religion should contribute to the marketplace of ideas . . . it is quite another to propose that religion should be used by the government as the basis for public policy decisions . . . [This] is the first step toward crushing a healthy religious pluralism under the boot of religious majoritarianism.[189]

In other words, religious influences on policy issues, such as the death penalty, polygamy, abortion, or marriage are all fine as long as they either lose the vote or coincide with the secular reasons for legislation. Professor Gey's views would support majority rule, as long as the majority is not thinking religious thoughts while in the ballot booth. Should Professor Gey's preferences prevail and the Supreme Court find that religion cannot inform or influence legislation, every morality-based law, from statutory rape to prohibitions on advertising liquor, would be reviewed to ensure that their reasons for passage were sufficiently devoid of religious purpose. The Supreme Court, however, has not sided with Professor Gey and, instead, has found overlaps between religious morality and public morality acceptable, provided these laws also have a secular purpose.[190]

Professor Gey's suggestion has some force as watching politicians invoke the Bible as reasons to pass legislation can cause an emotional cringe. Banning these sentiments, however, is certainly

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[189] Gey, *supra* note 7, at 1627.

[190] *See* Harris v. McRae, 448 U.S. 297, 319-20 (1980) ("the fact that the [federal] funding restrictions [on abortions] . . . may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.").

not related to the Constitution according to the founding views of Pennsylvania. The 'Get Religion Out of Government' view, described by Professors Gey and Sullivan, is purportedly required by a Constitution that Professor Sullivan sees as "a settlement by the Establishment Clause of the war of all sects against all."[191] Yet strangely, with the ratification of the federal Constitution, which concurred with the passage of a new state constitution that reincorporated estranged religious minorities, Pennsylvania did not disarm the populace of their religious sentiments in matters of public policy. Religious beliefs were still required for a place in the government, though they were expanded to include broader views. A ban on religious sway over legislation is also flatly contradicted by Penn's pronouncement that all governing laws "depend[ ] upon virtuous citizens and religious institutions . . . instilling a morality originating in natural law, discoverable from reason, and confirmed by scripture."[192] For Pennsylvania to ratify a federal Constitution supposedly establishing an atheist nation while continuing its historic entanglements between religion and government would be inexplicable. The lack of public debate on this contradiction can only be explained by a lack of contradiction.

As uncomfortable as it makes some, religion drives law because religion is the arena where most people learn the basics of right and wrong. While there will be secular reasons to support nearly all laws of morality, murder is not outlawed because a cost-benefit analysis proved that unjustified killings are economically inefficient. Rather, murder is outlawed because Thou Shalt Not Kill.[193] To invalidate a law because public officials or citizens had God on their minds while voting would be an invasion of conscience far worse than those perpetuated by even the most establishmentarian state in the American colonies. While an official state

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[191] Sullivan, *supra* note 187, at 199. *See also id.* at 197 (referring to the Establishment Clause as a "religious truce").
[192] LEE, *supra* note 53, at 33-34.
[193] *See* McGowan v. Maryland, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("State prohibition of murder, theft, and adultery reinforce commands of the Decalogue.").

religion can tax you, bar you from voting, and order you to church service against your will, it can never punish private thoughts and beliefs the way a bar on using religion as "the basis for public policy decisions and the legal mandates that enforce those decisions" would.[194] That the Establishment Clause could invalidate a law solely for the means by which people decide what is good or bad for the country is as unintended as it is unprincipled, and impractical to enforce. In fact, the prior review of Pennsylvania history shows that politics and religion could barely be separated. And according to Penn's vision, they should not be separated.

As an historical matter, these critics have it exactly backwards. The excessive entanglement of religion that Pennsylvanians sought to avoid was the *government's use of religion* to influence secular legislation—not independent religious opinion on public policy (i.e. religion's use of government). One of the primary effects of Penn's philosophy was to make each church free to criticize, advocate, or abstain from comment on governmental policy without fear of governmental direction or reprisal.[195] What was to be avoided was something akin to the State ordering its ministers to preach that 'Jesus hates low taxes' or 'drilling for oil is the Christian way.'[196] Citizens and public officials were encouraged to use their belief in God, regardless of denomination, to guide government. At the time of ratification, Pennsylvania still made the belief in God an indispensable requirement for those seeking public office. Entanglements with religion on a non-monetary level was seen by Pennsylvanians as crucial to the maintenance of a good government.

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[194] Gey, *supra* note 7, at 1627.

[195] LEE, *supra* note 38, at 36-37.

[196] *Cf.* Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U.L. Rev. 1217, 1232 (2004) ("[I]f churches perform governmental functions, the autonomy of the state is threatened; if the state funds churches, the autonomy of churches is threatened, and the autonomy of the state may be jeopardized as well if a powerful church receives all or a predominant share of state funding since that church might exert considerable power in the political process; and if the state controls church doctrine, the autonomy of the church is undermined.").

**B. Bicameralism is the Best Check on Religious Establishmentarianism**

Some historians view the ratification debate warnings of religious domination by distant central government as a proxy for the battle to save Pennsylvania's unicameral legislature.[197] While this is undeniably true, disingenuous motives do more to qualify the anti-establishmentarian arguments than to defeat them. The Anti-federalists came to power through the annually elected unicameral legislature and then abused that power by persecuting religious minorities. It was the Anti-federalists' insincerity that delivered the most poignant lesson: Tyranny begins at home, often through the most representative form of government. Actions in the unicameral assembly were swift and unchecked by the executive branch,[198] allowing the emotions of war or long-standing grudges to become official policies.

Interestingly, the objects of the Anti-federalists' religious abuse[199] were willing to forego what would become the Establishment Clause, but *not* the bicameral design of Congress. The Anti-federalist delegates to the ratifying convention issued their Address and Reasons of Dissent of the Minority, detailing their objections to the U.S. Constitution. The first was the absence of a provision declaring "[t]he right of conscience . . . inviolable; and neither the legislature, executive nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitution of the several states, which provide for the preservation of liberty in matters of religion."[200] Additionally, "there is no exemption of those persons who are conscientiously scrupulous of bearing

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[197] *See* IRELAND, *supra* note 73, at 98.
[198] *See* DOWNEY & BREMER, *supra* note 64, at 95.
[199] Those who had borne the brunt of religious persecution, the Quakers, Lutherans, Anglicans, and German Sectarians supported the Constitution even without a bill of rights. IRELAND, *supra* note 73, at 257.
[200] The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 239 (Ralph Ketcham, ed.) (1986).

arms."[201] Despite these purported deficiencies, the Pennsylvania Federalists, a collection of recently mistreated Anglicans and Quakers, ratified the U.S. Constitution on December 12, 1787 by a vote of 46 to 23.[202]

The assertion that the ratification debates over religion were an emotional ruse concealing the true disagreements over the structure of government is only half right. The structure of government is indispensable to the protection of religious rights. Few records reflect why a State that held religious protections so dear would find the Constitution acceptable without a Bill of Rights; however, the contemporaneous political clashes in Pennsylvania show that a deliberative State legislature provided more protection for religious minorities than any declaration in a governing document.

### C. The First Amendment May Not Have Preserved State Establishments

The history of Pennsylvania shows that the State's minorities were decidedly *not* looking to preserve a State establishment of religion, something that many have claimed was the true purpose of the Establishment Clause.[203] Aside from the fact that Pennsylvania had no established religion, the State itself was the source of religious persecution just prior to the time of ratification. Even if one asserted that the Establishment Clause, while not necessarily seeking to preserve established religions as much as preserving

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[201] *Id.* at 255.

[202] *Id.* at 237.

[203] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) ("On its face [the Establishment Clause] places no limit on the States with regard to religion. The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government. Whether and how this Clause should constrain state action under the Fourteenth Amendment is a more difficult question."); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 309-310 (1963) (Stewart, J., dissenting) ("the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments"); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311, 1392-93 (1997) ("the main purpose of the First Amendment . . . simply was to deny the federal government power . . . .").

whatever status quo regarding establishmentarianism existed in each State, the position is contradicted by the fact that religious minorities were explicitly seeking to use the federal Constitution as an agent of change in Pennsylvania.

The ratification debates in Pennsylvania[204] saw a concerted Anti-federalist campaign that placed a fear of federal establishment at the forefront of the public deliberation. The majority of Pennsylvanians squarely rejected these warnings, yet "Antifederalist depiction of the horrors of Federal limits on state sovereignty carried fewer negative connotations to those who had suffered at the hands of state government."[205] From the Pennsylvanian point of view, those who ratified the federal Constitution neither invited a federal religious invasion nor supported the State's discrimination against religious minorities. Overall, Pennsylvanians viewed the greatest threat to religious liberty as existing within the State, not from without. Since the goal was to change the structure of the State's political process, not to make establishmentarianism the right of either government, Pennsylvania casts some doubt on whether State establishments were preserved under the federal Constitution.

### D. The Government is Without Power to Withhold Religious Exemptions—Mostly

Stemming again from the belief that the government has no power over the natural, inalienable right to religious conscience, Penn's philosophy explicitly eschewed any official encumbrances on religion. The West New Jersey Concessions declared that "[n]o Men nor number of Men upon Earth hath power or Authority to rule over mens consciences in religious matters."[206] The Concessions barred any citizen from being "the least punished or hurt either in Person Estate or Priviledge" for their religious beliefs and

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[204] *See infra* Part III.B.4.

[205] IRELAND, *supra* note 73, at 228.

[206] Gildin, *supra* note 16, at 94 (quoting West New Jersey Concessions Ch. 16, *reprinted in* 1 THE PAPERS OF WILLIAM PENN 396–97 (Mary Maples Dunn & Richard S. Dunn eds., 1981)).

that each shall "at all times freely and fully have and enjoy his and their Judgments and the exercise of their consciences in matters of religious worship."[207] The natural law view of religion remains embodied in Pennsylvania's constitution.[208]

Throughout Pennsylvania's history, "Quakers [were] exempted from laws of general applicability concerning oaths, education, the military and marriage."[209] Even at the height of religious oppression in Pennsylvania, during the Revolutionary War, objecting Quakers and other pacifist sects were never pressed into military service. Nor was the absolutist view of religious exemptions reserved for traditionally powerful groups like the Quakers. Those who took their Sabbath on the Saturday challenged fines for working on Sunday and won.[210] The idea that "the demands of conscience—even if not shared by the majority of the populace—supersede civil obligations"[211] continues today in Pennsylvania's modern constitution.[212]

Contrary to some views, however, this does not necessarily create an explicit clash between Pennsylvania's disestablishmentarianism and the controversial *Employment Division v. Smith*,[213] which subordinated minority religious practices to laws of general

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[207] *Id.*

[208] *See* Pa. Const. art. I, § 3 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.").

[209] Gildin, *supra* note 16, at 92 (citing EDWARD CORBYN OBERT BEATTY, WILLIAM PENN AS SOCIAL PHILOSOPHER 120, 144 (1939)).

[210] KELLEY, JR., *supra* note 19, at 184–85.

[211] Gildin, *supra* note 16, at 88.

[212] *See* Penn. Const. art. III, § 16 ("The General Assembly shall provide for maintaining the National Guard by appropriations from the Treasury of the Commonwealth, and may exempt from State military service persons having conscientious scruples against bearing arms.").

[213] 494 U.S. 872 (1990).

applicability.[214] *Smith* reserved strict scrutiny for only those laws that appeared to target religious practices[215] while neutral laws that incidentally burdened religion needed only survive rational basis review. While admitting that this lesser standard places "at a relative disadvantage those religious practices that are not widely engaged in,"[216] the Court believed that this was necessary in a democratic society unlike anything Penn had ever imagined—one where "each conscience is a law unto itself."[217]

Whether the Founding era practices of Pennsylvania or the philosophy of William Penn could ever embrace the religious use of peyote is not a question that can be answered. Even in the most obvious parallels between modern Free Exercise cases and the historical views of Pennsylvania, that of conscientious objection to military service, it is unclear what utility original understanding can provide. In a pluralistic era of truly marginal religions, such as Scientology, and custom-tailored New Age spiritual beliefs which vary from person to person, it is unclear whether even the relatively absolutist view of religious exemptions would embrace controversies such as *United States v. Seeger*.[218] There, a conscientious objector petitioned that his ambiguous religious feelings were included in the Congressional definition of 'belief in a Supreme Being' which could exempt him from military service.[219] Seeger's objections were characterized as religious, however "he preferred to leave the question as to his belief in a Supreme Being open," that "his skepticism or disbelief in the existence of God did not necessarily mean lack of faith in anything whatsoever" and that his "belief in and devotion

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[214] *See generally* Gildin, *supra* note 16 (arguing that Pennsylvania's history and original intent towards religious liberty requires strict scrutiny of laws burdening religious practices).
[215] 494 U.S. at 877. This standard was later applied in Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).
[216] 494 U.S. at 890.
[217] *Id*.
[218] 380 U.S. 163 (1965).
[219] *Id*. at 165.

to goodness and virtue for their own sakes" amounted to "a religious faith in a purely ethical creed."[220]

When faced with cases like *Smith*, *Seeger*, and *Reynolds v. United States*,[221] any claim that Pennsylvania's views of religious exemptions would withstand confrontations with illicit drug use, military exemptions for agnosticism, and polygamy cannot be adequately supported. Although it is true that Pennsylvania history espouses governmental helplessness to interfere with the natural rights of conscience, this philosophy is countered by the notion that when religious freedom is used to undermine state interests, it loses its absolutist protection. Professor Gildin, whose own review of Pennsylvania history concluded that strict scrutiny is required for laws burdening religious freedom, explained that "[t]he only qualification on free exercise imposed by the Fundamental Constitutions is that the citizen 'not use this Christian liberty to licentiousness.'"[222] Penn's concessions that religious freedom could not be a vehicle for anti-social acts[223] constrict the permissive attitude towards religious exemptions to traditional Judeo-Christian religious practices. The historical support of religion as a means towards a better society also leans against the squeamishness towards judicial determination of what exactly is a religion and whether the asserted religious grounds for an exemption are sincerely held.[224] This aversion is grounded in the claim that any judicial analysis of what may be a bona fide religion would amount to a heresy trial. The historical

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[220] *Id*. at 166 (internal quotation marks omitted).
[221] 98 U.S. 145 (1879) (upholding ban on polygamy).
[222] Gildin, *supra* note 16, at 96 (quoting WILLIAM PENN AND THE FOUNDING OF PENNSYLVANIA 1680-1684: A DOCUMENTARY HISTORY 98–99 (Jean R. Soderlund *et al.* eds., 1983)).
[223] *Id.* (stating that Penn "answered the charge that religious freedom would justify 'all Manner of Savage Acts' with the concession that such freedom 'would not exempt any man . . . from not keeping those excellent Laws, that tend to Sober, Just and Industrious Living.'" (quoting WILLIAM PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE 33-34 (London, 1670)).
[224] *See* United States v. Ballard, 322 U.S. 78, 86 (1944) ("[W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede").

view, however, may not be so hesitant, as the natural protections for religion that allow exemptions from generally applicable laws would surely be lifted for sham religions used to shield anti-social behavior.

Of course, much of this analysis rests on speculation. The original intentions of Pennsylvania strongly support, as Professor Gildin argues, strict scrutiny of any law burdening marginalized Judeo-Christian-based religious practices.[225] While Penn and leading Pennsylvanians at the time of ratification may have been easily convinced to extend exemptions to religious practices of which they were wholly unaware, such as Mr. Seeger's ambiguous religious philosophy, peyote use, or polygamy, only a séance could truly answer the question. This enigma leads to the next conclusion that can be fairly drawn from a review of Pennsylvania history—as the catalog of American religious practices expands, the utility of the Establishment Clause contracts.

### E. The First Amendment is a Limited Tool with Little Value Today

As Professor Sullivan conceded, "[t]he Establishment Clause clearly forbids a government church, and with it oaths or tithes—that is, enshrinement of official religious belief or exaction of financial support for religion."[226] What makes this clear is the Constitutional text, historical practices, traditions, and establishmentarian problems of the Founding era that needed to be solved. These signal the original intent of those that ratified the Constitution. While poor treatment of religious minorities, be it brutal punishment or simple political exclusion, was a contentious issue at the time of ratification, displays of Christmas decorations on public property were not. Thus, the Establishment Clause was crafted to ease the problems with the former conflict, but not the latter. To many judges, commentators, and citizens, however, the Establishment Clause has no boundaries of usefulness and will al-

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[225] *See* Gildin, *supra* note 16.
[226] Sullivan, *supra* note 187, at 202.

ways provide grounds for a solution to every societal religious problem. Where the Living Constitution theorists err is in their attempts to treat the Establishment Clause as an empty vase which can be filled with whichever flowers they subjectively feel make the room look pretty. The fact is, the Establishment Clause can only solve a few, very overt problems and nothing more.[227]

In criticizing Judge McConnell's view of a bare bones Establishment Clause, Professor Sullivan reels off a litany of purported evils that would seep into American life without an infinite Establishment Clause.

> It seems he would allow significant religious speech and symbolic expression by government short of "proselytization." . . . he would dismiss claims of dissenters whose only complaint is that they are "irritated," "offended," or stigmatized by such messages. Indeed he would not have the courts trifle with "perceived messages" of endorsement much at all. Apparently he would allow public-sponsored crèches, proximate reindeers or not. Apparently he would also reverse *Edwards v. Aguillard* and permit the government to enforce in the public classroom a kind of fairness doctrine for the expression of "a wide variety of perspectives, religious ones included" -- even through the mouthpiece of a public teacher.[228]

Even assuming that all of these things are terrible problems that must be dealt with, according to the original intent and history of America's most religiously liberal colony, the Establishment Clause was never meant as an arbiter of *any* of these issues. Compared to what the First Amendment "clearly forbids," such as State churches and coerced monetary support for them, these issues were simply too trivial for consideration at a time when the State was stamping out the big problems of establishmentarianism: religious tests, double taxation on religious minorities, and political exclusion

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[227] *See* Scharffs, *supra* note 196, at 1231-1232 (discussing the primary concerns driving the Establishment Clause).

[228] Sullivan, *supra* note 187, at 204-205 (footnotes omitted).

based on denomination. While the substantive results Professor Sullivan is seeking may be reasonable and even wise, the Establishment Clause provides no guidance specifically because it was never *designed* to provide such guidance on the comparatively petty question of citizen offense at the mere sight of the Ten Commandments.

As the saying goes, when all you have is a hammer, everything looks like a nail. The persistence in using the ten bare words of the Establishment Clause as a hammer to settle disputes over school prayer, the Pledge of Allegiance, or the fragile emotions of those traumatized at the sight of religious displays on public grounds has left a series of bent and broken nails. The slew of vague and confusing judicial tests, purportedly derived from the Constitution, were never sanctioned or even considered by at least the Pennsylvanian signatories. Of course, few contemporary problems bear any resemblance to the past evils the Establishment Clause was created to eliminate; which is an indication that it has already done its job. The Establishment Clause is used up. While this article hardly advocates allowing all of these issues go unresolved, it does advocate that they be left to either statutes alone or to a new, more comprehensive Constitutional amendment. Almost no contemporary religious controversies are of a Constitutional dimension any more.

## VI. Conclusion

Under an original intent view of the Establishment Clause, even when filtered through the history and traditions of colonial America's most religiously liberal signatory of the Constitution, many outcomes to contemporary problems could be just plain bad. For example, the belief that government may rhetorically and neutrally promote religion rests on the assumption that atheists tend to be bad people. This belief, held by the Pennsylvanian signatories, could also Constitutionally permit the political exclusion of atheists. It is certainly both an under-inclusive and over-inclusive assumption; experience has shown us that some atheists can be good and some religious people can be bad. Thus, it is not a value that many Americans, even the devoutly religious, would agree with today.

And this is the underlying tension between the two schools of Constitutional interpretation. For those who believe in original intent, it is more important for judges to stick close to founding principles because they can be, for the most part, objectively discerned. Even if originalists personally disagree with these original values, the fact that the Constitution is a social contract requires the government to honor them until and unless the contract is properly amended. As an alternative, shortcomings may be addressed through the political process, such as not passing a law barring atheists from voting or holding public office. For those taking a Living Constitution approach, they believe that the language and original intent behind the Constitution can be ignored when it conflicts with whichever values they (with "they" being a relatively small and anonymous group of politically unaccountable judges and law professors) identify as being modern values. Of course, even in this process, Living Constitutionalists will reject the truly modern values that actually exist in exchange for the more 'progressive' values they wish society held instead. Thus, they do not view the Constitution as a social contract at all; but only as a helpful, yet ultimately expendable, guideline.

An examination of Pennsylvania's historical views towards religious minorities and establishmentarianism until the time of ratification is an attempt at compromise between the two schools. It adheres to the originalist view of the Constitution as a social contract, but does so by exploring the most tolerant and anti-establishmentarian colony in hopes that it would yield views sufficiently acceptable to Living Constitution theorists. In this sense, this article has almost certainly failed. Even Pennsylvania's original understanding of the Constitution is one that was strongly pro-religion, albeit the aversion to inter-religious favoritism was equally as strong.

Modern judicial adherence to Pennsylvania's history and views of disestablishmentarianism, or even an increased consideration of them, would deeply unsettle the current Constitutional ap-

proach to religious establishmentarianism, and not in a way that favors secularism. The most explicit change would be governmental advocacy of religion as the means towards a more civil and virtuous society. Today, we police the inverse—barring the government from encouraging people to join or continue their relationship with the church. This was not a protection that even the establishment-fearing Pennsylvanians wanted, and any claim that avoiding excessive government entanglements that may be seen as encouraging religiosity is simply unsupported by Pennsylvania's history. As viewed through this history, the government can freely encourage its citizens to find religion as much as it can encourage them to just say no to drugs or stay in school.

Yet, colonial Pennsylvania can be widely hailed today, as it was in its time, as easing the friction between religious minorities and majorities. William Penn's philosophy that rights of conscience were naturally free of any governmental interference was groundbreaking in its day and served as the backbone of Pennsylvanian views of establishmentarianism at the time of ratification and beyond.[229] As one of thirteen ratifying colonies, however, its influence in interpreting the Establishment Clause should be diluted, but its unique founding mission and history should displace the axis of Jefferson, Madison, and Virginia as our primary sources of historical context in considering what the Establishment Clause was designed to do. Pennsylvania's history reminds us that the Establishment Clause has been stretched beyond its intended uses, and that the rights of religious minorities—political inclusion, fair taxation, the right to own property, and the right to be left alone to practice as they please—were once basic and easily satisfied. For as much as originalists value the Constitution, it is no embarrassment to admit that contemporary problems have outgrown the Constitution's original purpose. For Living Constitutional theorists, the historical wants and needs of religious minorities ought to produce at least some acknowledgment that many modern religious rights and pro-

[229] *See* Gildin, *supra* note 16 (arguing Pennsylvania's Constitution continues to safeguard religious minorities more than the U.S. Constitution).

hibitions, both delivered and still sought, are not Constitutional at all but simply products of political preferences that have not garnered enough votes in our political institutions. The metaphor of the wall of separation between Church and State is well known. Pennsylvania's history illuminates the needed wall of separation between the Constitution and politics.