



6-1-2006

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## Recommended Citation

Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793 (2006).

Available at: <http://scholarship.law.nd.edu/ndlr/vol81/iss5/4>

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REGULATORY EXEMPTIONS OF RELIGIOUS  
BEHAVIOR AND THE ORIGINAL  
UNDERSTANDING OF THE  
ESTABLISHMENT CLAUSE

*Douglas Laycock\**

INTRODUCTION

The Symposium that includes this Article proclaims a “(re)turn to history” in religious liberty law. I doubt that we were ever away from history. Church-state relations were a much contested issue at the time of the American Founding, and those debates left an unusually thick record. All sides in modern debates have mined that record, however selectively, for evidence of original understanding.

One side cites Madison and Jefferson; the other side cites the defenders of the established church. One side cites the decision to end direct financial support of churches; the other side cites congressional chaplains and religious rhetoric by politicians and government offi-

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\* Yale Kamisar Collegiate Professor of Law, The University of Michigan. I wrote this article in the midst of my transition from The University of Texas to The University of Michigan, so I was able to use two great libraries. Of course I lacked the time to exhaust the resources of either. I am grateful to Jamie Richards at Texas for research assistance, to Aimee Mangan and the research staff in Michigan’s law library for help finding colonial sources, and to participants in the Columbia Law School Workshop on Legal Theory for comments and questions that were both challenging and helpful. A special thank you to J. William Frost, Professor Emeritus of Religion at Swarthmore College, who volunteered to check sources at the Swarthmore library on my behalf.

I have examined original sources wherever possible, but I benefited enormously from the work of other scholars who had already examined those sources with somewhat different questions in mind—especially J. William Frost, Philip Hamburger, Richard K. MacMaster, and Ellis West. I have retained the original spelling from the sixteenth, seventeenth, and eighteenth-century sources except where I had to rely on a compilation or reprint that had modernized spelling.

cial. At least in political and judicial debates, neither side makes much effort to take account of the evidence offered by the other side, or to craft a theory that explains why the Founders accepted government support of religion in some contexts and not in others.

The claims that nonpreferential aid is permitted, or that noncoercive aid is permitted, fit modern agendas much better than they fit eighteenth-century practice. Not all forms of government support for religion were controversial in the late eighteenth century, but once a form of support became controversial, making it nonpreferential or even noncoercive did not end the controversy.<sup>1</sup> A better first approximation is that the Founders prohibited forms of support that were controversial among Protestants; government financial support for churches was controversial in the eighteenth century, but nonfinancial support did not become controversial until the nineteenth century, when Catholic immigration expanded the range of religious pluralism and thus the range of controversy.<sup>2</sup>

The use of history has been selective not just in the sense that each side prefers its own half of history, but also in the sense that some prominent history is invoked repeatedly, and other history, less widely known, is largely ignored. Both sides in the Supreme Court give much attention to the late eighteenth century but very little to the nineteenth-century Protestant-Catholic battles over public schools, although those battles are the true origin of modern controversies over both financial aid to private schools and religious observance in public schools.<sup>3</sup> The Court has long debated Establishment Clause issues in originalist terms,<sup>4</sup> but it rewrote the law of free exercise with-

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1 See generally Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U. L. REV. 37 (1991) [hereinafter Laycock, "Noncoercive" Support] (rejecting the theory that the Founders were concerned only with coercive government support for religion); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986) [hereinafter Laycock, "Nonpreferential" Aid] (rejecting the theory that the Founders were concerned only with support that preferred one or some denominations over others).

2 See Laycock, "Nonpreferential" Aid, *supra* note 1, at 913-19.

3 See John C. Jefferies, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297-305 (2001); Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. (forthcoming Aug. 2006); Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1682 (2003) (reviewing PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002)).

4 See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-16 (1947) (relying on the history of disestablishment in America, and especially in Virginia); *id.* at 33-43 (Rutledge, J., dissenting) (same); *Wallace v. Jaffree*, 472 U.S. 38, 91-106 (1985) (Rehnquist, J., dis-

out a glance at original understanding.<sup>5</sup> When scholars began providing the historical evidence on free exercise,<sup>6</sup> each side on the Court predictably adopted the evidence that supported the position it had already taken.<sup>7</sup> The Court endlessly debates what the framers of the First Amendment thought about establishment, but it shows no interest in what the framers of the Fourteenth Amendment thought about establishment, although it is the Fourteenth Amendment that applies in most of its cases.<sup>8</sup> The Court is reasonably familiar with late eighteenth-century evidence on funding and religious speech by government officials,<sup>9</sup> but often it addresses newly emerging issues with little awareness of historical evidence that might be relevant.

This Article addresses one such underexamined issue. Some opponents of regulatory exemptions for religious practice claim that exemptions prefer religion and thus violate the Establishment Clause. This claim is inconsistent with the original understanding. There is much originalist debate about whether the founding generation un-

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senting) (relying on debates in the First Congress and the history of government support for religion).

5 See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

6 Compare Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that the original understanding offers no support for a free exercise right to regulatory exemptions), with Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (arguing that the original understanding is somewhat supportive of such a right).

7 Compare *City of Boerne v. Flores*, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring) (arguing that historical evidence supports *Employment Div. v. Smith*), and *Employment Div. v. Smith*, 494 U.S. 872, 876–90 (Scalia, J.) (holding that government-imposed burdens on religious practice require no justification if imposed by neutral and generally applicable law), with *Boerne*, 521 U.S. at 548–64 (O'Connor, J., dissenting) (arguing that historical evidence is inconsistent with *Smith*), and *Smith*, 494 U.S. at 892–903 (O'Connor, J., concurring) (rejecting *Smith's* rule and arguing that all government-imposed burdens on religious practice require compelling justification).

8 For nineteenth-century developments in disestablishment, see Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1100–54 (1995). I do not subscribe to Lash's federalism interpretation of the Establishment Clause as of 1791, but that disagreement must await another day.

9 See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854, 2882–88 (2005) (Stevens, J., dissenting) (conceding history of religious statements by federal officials and providing additional context); *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2748–50, 2753–55 (2005) (Scalia, J., dissenting) (reviewing history of religious statements by federal officials); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852–60 (1995) (Thomas, J., concurring) (reviewing Founding-era opposition to funding of churches); *id.* at 868–72 (Souter, J., dissenting) (same); see also cases cited *supra* note 4.

derstood regulatory exemptions to be constitutionally *required*.<sup>10</sup> But there is virtually no evidence that anyone thought they were constitutionally *prohibited* or that they were part of an establishment of religion. The established church had no need for exemptions, because its teachings were in accord with government policy. Exemptions protect minority religions, and they emerged only in the wake of toleration of dissenting worship. Exemptions are subject to limits in specific cases; they cannot prefer particular faiths or particular religious practices, and they cannot impose significant costs on persons not voluntarily engaged in the exempted religious practice. But nothing in our constitutional tradition suggests that regulatory exemptions for religious practice are facially invalid.

Fortunately, the Court agrees. Three times in recent years it has unanimously rejected the claim that regulatory exemptions for religiously motivated conduct establish the unregulated religion.<sup>11</sup> It reached these decisions without inquiring into original understanding. This Article argues that such evidence as we have of original understanding supports the Court's decisions.

It is no part of my claim that original understanding should be controlling. But original understanding is relevant on almost any view of constitutional interpretation, and in the view of some Justices, it should be decisive. So it is a matter of some importance to review the original understanding that supports or contradicts the Court's decisions.

## I. REGULATORY EXEMPTIONS AND THE ESTABLISHMENT CLAUSE

### A. *The Attack on Regulatory Exemptions*

Establishment Clause attacks on religious exemptions come in many variations.<sup>12</sup> But the core idea at the heart of all those argu-

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<sup>10</sup> See *supra* notes 6–7.

<sup>11</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 719–26 (2005); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 705–06 (1994); *id.* at 711–12 (Stevens, J., concurring); *id.* at 715–16 (O'Connor, J., concurring); *id.* at 722–27 (Kennedy, J., concurring in the judgment); *id.* at 743–45 (Scalia, J., dissenting); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334–39 (1987); *id.* at 340–46 (Brennan, J., concurring); *id.* at 346 (Blackmun, J., concurring); *id.* at 348–49 (O'Connor, J., concurring); see *infra* notes 254–67 and accompanying text; see also *Smith*, 494 U.S. at 890 (reaffirming legislative power to enact exemptions while holding that they are not constitutionally required); *id.* at 893–97 (O'Connor, J., concurring) (arguing that exemptions are constitutionally required).

<sup>12</sup> This argument is made most forcefully and explicitly in the losing briefs in the cases cited *supra* note 11. See Brief for Respondents at 10–24, *Cutter*, 544 U.S. 709 (No. 03-9877); Brief for Respondents at 21–29, *Grumet*, 512 U.S. 687 (Nos. 93-517, 93-

ments is that government can establish a religion by failing to regulate it, at least if the religion or one of its practitioners does some act that is regulated in secular contexts. Exemptions from government regulation are said to give special preference to the unregulated religious practice, and thus to establish the religion of which the practice is a part.

The argument proceeds from the premise that the Establishment Clause, or the Establishment Clause and Free Exercise Clause together, require government neutrality toward religion, including neutrality between religion and nonreligion. That premise has been controversial, but I share it; nothing in this Article depends on rejecting the premise of government neutrality toward religion.

The second step in the modern argument that exemptions violate the Establishment Clause is to assume that neutrality means what I have called “formal neutrality”—the absence of rules that formally distinguish on the basis of religion.<sup>13</sup> A rule that children may consume wine at communion services and Seder dinners, but not at secular events—or any other rule permitting a thing to be done for religious purposes but not for secular purposes—violates formal neutrality. Regulatory exemptions are not formally neutral, but they are often consistent with what I have called “substantive neutrality.”<sup>14</sup>

Formal neutrality seeks to create religiously neutral *categories*; substantive neutrality seeks to create religiously neutral *incentives*, minimizing the extent to which government either encourages or

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527, 93-539); Brief for Appellees at 25–39, *Amos*, 483 U.S. 327 (Nos. 86-179, 86-401). For academic versions of the argument, see PHILIP B. KURLAND, *RELIGION AND THE LAW* 17–18, 40–41, 111–12 (1962) (arguing that the Religion Clauses prohibit any government classification based on religion, either to impose a burden or confer a benefit, including religious exemptions from regulation); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 182–85 (1990) (arguing that regulatory exemptions for religion subordinate democratic control to a nondemocratic, extrahuman force); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123, 123–24 (arguing that the Establishment Clause prohibits the exemptions that the Free Exercise Clause seems to require, so that one of the Clauses must be interpreted very narrowly and its values subordinated to the values of the other). For a more nuanced view, see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 246–52 (2006) (arguing that exemptions are unconstitutional if they exceed the authors’ principle of “equal liberty,” which depends on sophisticated comparisons of religious commitments to comparably important secular commitments).

13 See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1001 (1990).

14 *Id.* at 1001.

discourages religious practice.<sup>15</sup> Criminalizing communion wine for children is a powerful discouragement of a religious exercise; permitting children to take both the bread and wine at communion is unlikely to encourage nonbelievers to attend worship services, or to encourage believers to shift from a denomination that uses grape juice to a denomination that uses wine.

This choice between formal and substantive neutrality poses the modern conceptual argument in a nutshell, but it is relevant here only to the task of integrating original understanding with modern interpretation. My principal purpose here is to test the conclusion of the formal neutrality argument—that religious exemptions violate the Establishment Clause—against the original understanding of the Establishment Clause.

There is no significant originalist support for the core idea that exempting religion from regulation establishes religion. Exemptions from regulation were no part of the establishment of religion known to the founding generation. Exemptions emerged as an outgrowth of the state-by-state process of expanding free exercise. Some of these exemptions provoked substantial debate, and their opponents made many arguments, but I have found no one in the eighteenth century who attacked them as an establishment of religion or denied that legislatures had power to enact them.

### B. *The Features of Establishment*

The essence of establishment was government sponsorship and control of a single church or, in later years, of a group of churches, such as all Protestant denominations, or all Christian denominations. In Judge McConnell's comprehensive survey of establishment in England and the colonies, he identifies six historic "Elements of the Establishment:"<sup>16</sup>

1. Governmental Control Over the Doctrines, Structure, and Personnel of the State Church;<sup>17</sup>
2. Mandatory Attendance at Religious Worship Services in the State Church;<sup>18</sup>

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15 See *id.* at 1001–06; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 561–63 (1993) (Souter, J., concurring) (further comparing formal and substantive neutrality).

16 Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003).

17 *Id.*

18 *Id.* at 2144.

3. Public Financial Support [of the State Church];<sup>19</sup>
4. Prohibition of Religious Worship in Other Denominations;<sup>20</sup>
5. Use of the State Church for Civil Functions;<sup>21</sup> and
6. Limitation of Political Participation to Members of the State Church.<sup>22</sup>

This careful listing of six distinct elements is organizationally helpful, but each of these elements is familiar from other thorough descriptions of the established churches.<sup>23</sup> Each of these historic elements of the establishment is prohibited by modern constitutional law, sometimes with controversy about the limits of the principle and its application to analogous cases:

1. Government controlled the doctrine, structure, and personnel of the established church; today, government is not permitted to control the doctrine, structure, or personnel of religious organizations.<sup>24</sup>

2. Government mandated attendance at worship services of the established church; today, mandatory attendance at worship services is unconstitutional, even when judicial deference is at its maximum, as in judicial review of military regulations.<sup>25</sup> The contested modern counterpart to mandatory worship is prayer and other religious observances at government-sponsored events that people attend for secular reasons.<sup>26</sup>

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19 *Id.* at 2146.

20 *Id.* at 2159.

21 *Id.* at 2169.

22 *Id.* at 2176.

23 *See, e.g.*, THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 1-77* (1986). Of course I do not mean to imply that McConnell merely organizes earlier work. He also provides clear analysis, massive supporting detail, and careful documentation.

24 *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595, 602-06 (1979) (holding that civil courts may resolve church property disputes on the basis of the church's own documents, or by deferring to church tribunals, but not on the basis of judicial resolution of any issue of religious doctrine or practice); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-25 (1976) (holding that civil courts cannot review church tribunal's decisions to remove bishop and divide diocese); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 106-21 (1952) (holding that a statute awarding church property and authority to dissident faction in preference to those recognized by original church authorities violates the Free Exercise Clause).

25 *See Anderson v. Laird*, 466 F.2d 283, 283-84 (D.C. Cir. 1972) (*per curiam*) (invalidating compulsory chapel at military academies); *id.* at 284-96 (Bazelon, J., concurring); *id.* at 296-305 (Leventhal, J., concurring).

26 *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301-17 (2000) (holding that student-led invocation at high-school football games violates the Establishment Clause); *Lee v. Weisman*, 505 U.S. 577, 586-99 (1992) (holding that clergy-led invocation at middle-school graduation violates the Establishment Clause); *Sch. Dist.*



3. The established church received tax support for its core religious functions; today, tax support for those functions is clearly unconstitutional, and the debated question is whether tax support of religiously sponsored schools or social services is sufficiently analogous to be an establishment.<sup>27</sup>

4. Government suppressed religious competition with the established church; today, restrictions on minority faiths are rarely part of any effort to establish some other religion, and such restrictions are now treated as a free exercise issue.<sup>28</sup> This distinction has very early roots. Both England and America reached relative consensus on free exercise long before they reached anything like consensus on disestablishment. England enacted “toleration” for all Trinitarian Protestants in 1688, in the wake of the Glorious Revolution,<sup>29</sup> and John Locke published his influential justification for toleration the following year.<sup>30</sup> The core idea of “toleration” was that religious dissenters would be free to worship in their own way while the established church continued to function with little or no change for everyone else.<sup>31</sup>

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v. Schempp, 374 U.S. 203, 223–27 (1963) (holding that opening school day with prayer and Bible reading violates the Establishment Clause); Engel v. Vitale, 370 U.S. 421, 424–36 (1962) (holding that reciting an official prayer in public schools violates the Establishment Clause).

27 See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639, 648–63 (2002) (upholding a program of state vouchers that could be used to pay tuition at a wide range of public and private schools, including religious schools); Lemon v. Kurtzman, 403 U.S. 602, 611–25 (1971) (holding that cash grants to supplement teacher salaries at religious schools violate the Establishment Clause).

28 See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–47 (1993) (holding that a ban on animal sacrifice violates the Free Exercise Clause); Employment Div. v. Smith, 494 U.S. 872, 876–90 (1990) (holding that the Free Exercise Clause requires no justification of government-imposed burdens on religious practice if those burdens are imposed by neutral and generally applicable law).

29 An Act for Exempting their Majestyes Protestant Subjects Dissenting from the Church of England from the Penalties of Certain Lawes, 1688, 1 W. & M., c. 18 (Eng.) [hereinafter Toleration Act], reprinted in 6 THE STATUTES OF THE REALM 74 (photo. reprint 1993) (1819).

30 See John Locke, A Letter Concerning Toleration, in THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 125 (J.W. Gough ed., Basil Blackwell 3d ed. 1966) (1690). The letter was first published in English in November 1689; a revised edition was published in 1690. See J.W. Gough, Introduction to THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION, supra, at xlvii–xlviii.

31 So, for example, the English statute commonly known as the “Act of Toleration” was written in terms of the rights and duties of persons “dissenting from the Church of England,” as indicated in the formal title, in §§ 4, 5, and 6, and in similar formulations in § 7 (“dissenting Protestants”) and §10 (“Dissenters from the Church

5. Government used the established church for civil functions; today, government cannot delegate government functions to religious organizations,<sup>32</sup> and the point of modern controversy is whether it can contract for performance of specific services on equal terms with religious and secular organizations alike.<sup>33</sup>

6. Government restricted political participation to members of the established church; today, the state cannot restrict political participation on the basis of religious convictions or participation.<sup>34</sup>

Even the modern controversy over government endorsement of religious beliefs may readily be analogized to government designating the church or group of churches to be established.<sup>35</sup>

Exemptions from regulation do not appear on Judge McConnell's list or in any other description of the established church. The established church had no need of regulatory exemptions, because government rarely made laws that prevented members of the established church from practicing their religion. Laws regulating conduct were generally consistent with the moral commitments of the established church, both because the established church and its members had substantial political influence, and because government's control

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of England"). See *Toleration Act*, *supra* note 29, at 74–75; see also *People v. Philips* (N.Y. Ct. Gen. Sess. June 14, 1813), reprinted in WILLIAM SAMPSON, *THE CATHOLIC QUESTION IN AMERICA* 111 (photo. reprint 1974) (1813), and excerpts reprinted in *Privileged Communications to Clergymen*, 1 *CATH. LAW.* 199, 207 (1955) ("In this country there is no alliance between church and state; no established religion; no tolerated religion—for toleration results from establishment.").

32 See, e.g., *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696–702 (1994) (plurality opinion) (holding that state cannot define a school district on religious lines); *id.* at 728–30 (Kennedy, J., concurring) (providing the fifth vote on the ground that state cannot draw electoral boundaries on religious lines); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 120–27 (1982) (holding that state cannot delegate to churches any portion of its power to grant or withhold liquor licenses).

33 See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–63 (2002) (holding that state can pay for education of children in religious and secular schools alike); *Bowen v. Kendrick*, 487 U.S. 589, 602–18 (1988) (holding that government can give grants to both religious and secular non-profit organizations for programs to prevent adolescent pregnancy); *Bradfield v. Roberts*, 175 U.S. 291, 295–300 (1899) (holding that government could contract with Providence Hospital, owned and operated by an order of nuns, for care of the indigent patients in the District of Columbia).

34 See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 625–29 (1978) (plurality opinion) (holding that state constitutional provision precluding ministers from serving in the legislature violates Free Exercise Clause); *id.* at 629–42 (Brennan, J., concurring) (stating that provision violates both the Free Exercise and the Establishment Clauses); *id.* at 642–43 (Stewart, J., concurring) (stating that provision violates the First Amendment); *id.* at 643–46 (White, J., concurring) (stating that provision violates the Equal Protection Clause).

35 See Laycock, "Noncoercive" Support, *supra* note 1, at 41–48.

over the established church, generally including the power to appoint clergy, tended to prevent the emergence of religious teachings that challenged government policy.<sup>36</sup> The King was the supreme head of the Church of England,<sup>37</sup> all Anglican clergy were appointed under his authority,<sup>38</sup> and fundamental religious teachings were specified by statute, beginning with the wonderfully named act “abolishing diversity in Opynyons.”<sup>39</sup> In Massachusetts and the other New England establishments modeled on Massachusetts, clergy were elected by the voters of each local jurisdiction.<sup>40</sup>

Even a nonestablished church has no need for exemptions where its members have political control. Thus in Pennsylvania, where there was never an established church, there was no exemption from military service or oath taking so long as the Society of Friends—“the people commonly called Quakers” in the usage of the time—were politically dominant. Instead, the laws did not require military service or oath taking of anyone.<sup>41</sup> Exemptions were enacted only after Quakers lost control—when the Crown imposed oath requirements<sup>42</sup> and when a new political majority enacted conscription to raise an army for the Revolution.<sup>43</sup> Then the Quakers, as a faith unable to

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36 See McConnell, *supra* note 16, at 2131–44 (reviewing the many ways in which government controlled the established church).

37 See An Acte concernynge the Kynges Highnes to be supreme heed of the Church of Englande & to have auctoryte to reforme & redresse all errors heresyces & abuses yn the same, 1534, 26 Hen. 8, c. 1 (Eng.), *reprinted in* 3 THE STATUTES OF THE REALM, *supra* note 29, at 492.

38 See An Acte restraynyng the payment of Annates, &c, 1534, 25 Hen. 8, c. 20 (Eng.), *reprinted in* 3 THE STATUTES OF THE REALM, *supra* note 29, at 462.

39 See An Acte abolishing diversity in Opynyons, 1539, 31 Hen. 8, c. 14 (Eng.), *reprinted in* 3 THE STATUTES OF THE REALM, *supra* note 29, at 739.

40 See MASS. CONST. of 1780, pt. I, art. III, *reprinted in* 3 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 1888, 1889–90 (Francis Newton Thorpe ed., 1909) [hereinafter LAWS OF THE STATES].

41 The Law About the Manner of Giving Evidence and Against Such as Lie in Conversation, ch. 99 (1700), *reprinted in* 2 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, at 133 (James Mitchell and Henry Flanders comps., Clarence M. Busch 1896) [hereinafter PA. STAT.]. The law was repealed by the Queen in Council in 1706.

42 An Act Prescribing the Forms of Declaration of Fidelity, Abjuration and Affirmation, Instead of the Forms Heretofore Required in Such Cases, ch. 281 (1724), *reprinted in* 3 PA. STAT., *supra* note 41, at 427. The long dispute over oaths in the early eighteenth century is described in J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA 23–25 (1990).

43 See, e.g., Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 388–94 (1994) (summarizing developments from a perspective hostile to exemptions).

control public policy even in Pennsylvania, needed exemptions. And within the limits described in the next Part, these exemptions were enacted.<sup>44</sup>

## II. THE ORIGIN OF REGULATORY EXEMPTIONS

Regulatory exemptions emerged when the majority became willing to provide for the religious liberty of minority faiths. Exemptions were never part of the establishment; they grew out of a political commitment to free exercise. The emergence of free exercise was an early step in the long process of *disestablishment*, but as we shall see, regulatory exemptions could and did coexist with formally established churches.

Disestablishment did not happen all at once; it emerged first in certain colonies and later state-by-state in the early republic. The formal designation of an established and tax-supported church was abandoned over a period of about sixty years, beginning in the 1770s and ending in 1833.<sup>45</sup> But this was just one stage in a longer process; the multiple elements of the classic establishment were abandoned one-by-one over a period of centuries, and the gradual abandonment of informal government support for popular religion continues, with debate and resistance, to this day.

As early as 1675, Connecticut exempted Quakers from attending the established worship—provided they did not assemble for religious purposes themselves;<sup>46</sup> after 1708, Connecticut permitted dissenters to worship in their own way.<sup>47</sup> In 1688, the Act of Toleration permit-

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44 See PA. CONST. of 1776, Declaration of Rights, art. VIII (“Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent . . .”), reprinted in 5 LAWS OF THE STATES, *supra* note 40, at 3081, 3083. This and other Pennsylvania provisions, and the qualification of an “equivalent,” are discussed *infra* in notes 125–32 and accompanying text.

45 See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1432–48, 1457–1540 (reviewing disestablishment state-by-state). The beginning date would be much earlier if one includes the states that never had a tax-supported church.

46 Act of July 9, 1675, reprinted in 2 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 260, 264 (Hartford, F.A. Brown 1852). For descriptions of this and other early steps toward tolerance, see CURRY, *supra* note 23, at 25.

47 See An Act for Securing the Rights of Conscience in Matters of Religion, to Christians of Every Denomination in This State, reprinted in ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 21 (Hartford, Elisha Babcock 1786) [hereinafter CONNECTICUT LAWS]. The cited source is an alphabetical collection of Connecticut statutes in effect in 1786, but it does not give dates of enactment. The Baptist leader John Leland gives the date of the original version of this statute as 1708. See Extracts from Connecticut Ecclesiastical Laws, in JOHN LELAND, THE CONNECTICUT DISSENTER’S

ted dissenting Trinitarian Protestants to worship in England.<sup>48</sup> This reform spread slowly and unevenly through the colonies, although resistance persisted in Virginia up to the eve of the Revolution.<sup>49</sup> In 1753, the King's Attorney General issued an opinion that the Act of Toleration applied throughout the colonies.<sup>50</sup>

Once a state decided that minority faiths should be permitted to freely worship, the logic of toleration suggested that they should also be exempted from other laws that made their lives unnecessarily difficult. The impulse that led to toleration was that religious dissenters should be free to live in a jurisdiction and that their lives should not be made miserable because of their faith. Once a jurisdiction came around to this view, it quickly became apparent that toleration must apply not just to belief, but also to religious speech and worship, and to important religious conduct. Dissenters could not live in a state where their worship was penalized, but neither could they live in a state where any of their other important religious practices were penalized. Some legislators may have viewed these regulatory exemptions for religious conduct as a right and others as a matter of legislative grace, but either way, regulatory exemptions quickly emerged in the wake of toleration for dissenting worship.

The first exemption from oath taking appeared in 1669 in the Carolina colony,<sup>51</sup> which from its charter in 1663 recruited settlers by advertising "full and free Liberty of Conscience."<sup>52</sup> As toleration spread through the eighteenth century, the exemption from oath tak-

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STRONG BOX: NO. 1, at 26, 28 (New London, Charles Holt 1802), *available at* Infotrac, Gale Doc. No. F3704953471.

48 Toleration Act, *supra* note 29, at 74.

49 See Esbeck, *supra* note 45, at 1475-76, 1485-87, 1537; McConnell, *supra* note 16, at 2161-69.

50 See SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 105-06 (1902).

51 Fundamental Constitutions of Carolina § 100 (1669), *reprinted in* 5 *LAWS OF THE STATES*, *supra* note 40, at 2772, 2784. Subsection III says that "every church or profession shall, in their terms of communion, set down the external way whereby they witness a truth as in the presence of God . . ." *Id.* § 100(III), at 2784. Thomas Curry reports that Quakers "enter[ed] pledges in a book in lieu of swearing." CURRY, *supra* note 23, at 56. By the Revolution, North Carolina had adopted the common solution of allowing Quakers to affirm instead of swear. See An Act Concerning Oaths, ch. 108, § 4 (1777) (codifying "the manner heretofore used and accustomed"), *reprinted in* 1 *LAWS OF THE STATE OF NORTH CAROLINA* 269, 270 (Raleigh, Joseph Gales 1821); An Act for Establishing Courts of Law, and for Regulating the Proceedings Therein, ch. 115, § 42 (1777) (making clear that the exemption extended to criminal as well as civil trials), *reprinted in* 1 *LAWS OF THE STATE OF NORTH CAROLINA*, *supra*, at 281, 300.

52 CURRY, *supra* note 23, at 56.

ing became nearly universal.<sup>53</sup> Even Connecticut and Massachusetts, the colonies that had persecuted Quakers most vigorously,<sup>54</sup> enacted exemptions from oath taking in the eighteenth century.<sup>55</sup> The right to affirm instead of swear appears four times, matter-of-factly and without controversy, in the Constitution of the United States, in provisions ratified both before and simultaneously with the Establishment Clause.<sup>56</sup> However familiar and uncontroversial it has become, the exemption from the obligation to take oaths is in fact a religious exemption from a generally applicable law. Those who proposed and ratified the Establishment Clause do not appear to have thought that this exemption was an establishment of religion.

North Carolina and Maryland enacted exemptions from the requirement of removing hats in court.<sup>57</sup> This was a response to a famous incident, much denounced in America, in which an English

53 See Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1630–32 (1989) (collecting provisions from state and federal constitutions).

54 See CURRY, *supra* note 23, at 21–22. Massachusetts hanged four Quakers between 1658 and 1661, when the Crown intervened to stop the practice. See *id.* at 22; Act of May 28, 1661 (providing for multiple whippings and banishment of Quakers, and execution of those who returned repeatedly), *reprinted in* 4 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND pt. 2, at 18, 19–20 (Nathaniel B. Shurtleff ed., Boston, William White 1854) [hereinafter MASSACHUSETTS BAY RECORDS]; Act of Nov. 27, 1661 (suspending these penalties in deference to a letter from the King), *reprinted in* 4 MASSACHUSETTS BAY RECORDS, *supra*, at 34, 34; Act of Oct. 8, 1662 (reinstating a smaller number of whippings, and banishment), *reprinted in* 4 MASSACHUSETTS BAY RECORDS, *supra*, at 58, 59.

55 For Connecticut, see An Act for Prescribing and Establishing Forms of Oaths in This State, *reprinted in* CONNECTICUT LAWS, *supra* note 47, at 182, 187; An Act Relative to the People Commonly Called Quakers, *reprinted in* CONNECTICUT LAWS, *supra* note 47, at 196, 197. For Massachusetts, see An Act Providing that the Solemn Affirmation of the People Called Quakers Shall, in Certain Cases, Be Accepted Instead of an Oath in the Usual Form; and for Preventing Inconveniences by Means of Their Having Heretofore Acted in Some Town Offices Without Taking the Oaths by Law Required for Such Offices, ch. 20 (1744), *reprinted in* 3 ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 126 (Boston, Albert J. Wright 1878) [hereinafter MASSACHUSETTS ACTS AND RESOLVES]. For discussion, see CURRY, *supra* note 23, at 89–90.

56 See U.S. CONST. art. I, § 3, cl. 6 (oath of Senators when sitting as court of impeachment); *id.* art. II, § 1, cl. 8 (presidential oath); *id.* art. VI, cl. 3 (oath of state and federal legislators and executive and judicial officers to support the Constitution); *id.* amend. IV (oath on application for search warrant).

57 See Act of Apr. 19, 1784, ch. 29, § II, 1784 N.C. Sess. Laws 363, 363 (“[I]t shall be lawful for the people called Quakers to wear their hats as well within the several courts of judicature in this state as elsewhere, unless otherwise ordered by the court.”), *microformed on* North Carolina General Assembly Acts (William S. Hein & Co.). The Maryland law, which may have been some sort of executive order, is de-

judge had a hat placed upon the head of William Penn, and then held Penn in contempt for refusing to remove it.<sup>58</sup> Rhode Island exempted Jews from incest laws with respect to marriages "within the degrees of affinity or consanguinity allowed by their religion."<sup>59</sup>

Another common set of exemptions, more closely connected to the process of disestablishment, was exemption from paying taxes to support the established church. Beginning in the eighteenth century, exemptions from church taxes spread through the colonies that collected such taxes, although implementation was sometimes grudging.<sup>60</sup> The famous general assessment proposal in Virginia, in 1785, was a last attempt to preserve financial support for churches by including all Christian denominations in the benefits and by universalizing the exemption—any taxpayer could support either the church of his choice or a fund for schools.<sup>61</sup> But on this issue, exemptions and multiple establishments were only a stopgap. Virginia's general assessment bill was defeated. By 1833, the last state system of tax support for churches was repealed in Massachusetts,<sup>62</sup> and exemptions from the church tax were no longer an issue.

The first exemption for conscientious objectors to military conscription was enacted in 1673, in famously tolerant Rhode Island.<sup>63</sup> It

scribed in ROBERT J. BRUGGER, *MARYLAND: A MIDDLE TEMPERAMENT 1634–1980*, at 29–30 (1988).

58 For elaboration of this incident, see McConnell, *supra* note 6, at 1471–72.

59 An Act Regulating Marriage and Divorce § 7 (1798), *reprinted in 2 THE FIRST LAWS OF THE STATE OF RHODE ISLAND* 481, 483 (John D. Cushing ed., 1983).

60 See, e.g., An Act To Exempt Persons Commonly Called Anabaptists, and Those Called Quakers, Within This Province, from Being Taxed for and Towards the Support of Ministers (1728), *reprinted in 2 MASSACHUSETTS ACTS AND RESOLVES, supra* note 55, at 494–96 (Boston, Wright & Potter 1874); MASS. CONST. of 1780, pt. I, art. III, ("And all moneys paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends.") *reprinted in 3 LAWS OF THE STATES, supra* note 40, at 1888, 1890. For additional examples and discussion, see CURRY, *supra* note 23, at 89–90; Esbeck, *supra* note 45, at 1434–36, 1440–47, 1476–77, 1479, 1489–91, 1498, 1508 n.431, 1512; McConnell, *supra* note 6, at 1469.

61 The Virginia bill is reprinted as a supplementary appendix to Justice Rutledge's dissenting opinion in *Everson v. Board of Education*, 330 U.S. 1, 72–74 (1947) (Rutledge, J., dissenting). For analysis, see THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA* 108–09 (1977).

62 See MASS. CONST. amend. art. XI (repealing "the third article of the bill of rights").

63 See R. R. Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 412–13 (1952). An earlier Massachusetts law exempted any person who would pay twelve pence. Act of Oct. 19, 1664, *reprinted in 4 MASSACHUSETTS BAY RECORDS, supra* note 54, at 135. But there is no reason to assume

provided that no person or persons conscientiously opposed to military service

shall at any time be compelled against his or their judgment and conscience to trayne, arm or fight, to kill any person nor persons by reason of, or at the command of any officer of this Collony, civill nor military, nor by reasons of any by-law here past or formerly enacted; nor shall suffer any punishment, fine, distraint, pennalty nor imprisonment, who cannot in conscience traine, fight, nor kill any person nor persons . . . .<sup>64</sup>

The Act further provided that conscientious objectors should perform what would be called, in twentieth-century discussions of conscription,<sup>65</sup> alternative service:

Provided, nevertheless . . . that when any enemy shall approach or assault the Collony or any place thereof, that then it shall be lawful for the civill officers for the time beinge, as civill officers (and not as martiall or military) to require such said persons as are of sufficient able bodye and of strength (though exempt from arminge and fightinge), to conduct or convey out of the danger of the enemy, weake and aged impotent persons, women and children, goods and cattle, by which the common weale may be better maintained, and works of mercy manifested to distressed, weake persons; and shall be required to watch to informe of danger (but without armes in martiall manner and matters), and to performe any other civill service by order of the civill officers for the good of the Collony, and inhabitants thereof.<sup>66</sup>

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this was for the benefit of conscientious objectors; Massachusetts had reenacted its laws for whipping and banishing Quakers only two years before. See *supra* note 54. Massachusetts finally exempted Quakers from military service in 1757. An Act To Exempt the People Called Quakers from the Penalty of the Law for Non-attendance on Military Matters, ch. 17 (1757) [hereinafter Massachusetts Act], reprinted in 4 MASSACHUSETTS ACTS AND RESOLVES, *supra* note 55, at 49 (Rand, Avery & Co. 1881).

64 Act of Aug. 13, 1673, reprinted in 2 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 488, 498 (John Russell Bartlett ed., Providence, Crawford Green & Bro. 1857) [hereinafter RHODE ISLAND RECORDS].

65 See 50 U.S.C. app. § 456(j) (2000) (requiring conscientious objectors to perform “noncombatant service,” or, if they conscientiously object to that as well, “such civilian work contributing to the maintenance of the national health, safety, or interest as the Director may deem appropriate”). For repeated use of the phrases “alternative service” and “alternative civilian service” to describe this requirement, see *Johnson v. Robison*, 415 U.S. 361, 363 n.1, 364, 365 n.6, 367, 374, 376, 378–79, 382–83, 385 n.19 (1974); *id.* at 388–89 (Douglas, J., dissenting).

66 Act of Aug. 13, 1673, reprinted in RHODE ISLAND RECORDS, *supra* note 64, at 498–99.



Exemption from military service was of course the most controversial claim to exemption.<sup>67</sup> This exemption is necessary to relieve an egregious burden on one of the most deeply held obligations of conscience, but it also confers a large secular benefit, relieving those exempted from essential duties that can be dangerous, unpleasant, and difficult. The secular benefit creates resentment; where the number of conscientious objectors is large, as in colonial Pennsylvania, exemption concentrates the burdens of military service on others to an extent that is significant and not just theoretical. The effect on secular benefits and burdens distorts religious incentives; it can tempt people to falsely claim the exemption, or to honestly adopt the religious belief that makes them eligible for the exemption. In cases such as this, where religious exemption confers a substantial secular benefit, it is difficult to choose the more nearly neutral course.<sup>68</sup>

Most colonies, and later most states, responded to this difficulty with a compromise something like that illustrated in Rhode Island: Quakers and similar conscientious objectors were exempt from military service in person, but were required to provide a substitute, pay a commutation fee, or less commonly, perform alternative service.<sup>69</sup> This is a real and important exemption, even though less than what the Quakers and other pacifist faiths wanted. The debates over these exemptions are a principal topic of the next Part.

### III. THE FOUNDING-ERA DEBATES

#### A. *Legislative Debates*

Legislatively enacted exemptions for religious practice were thus common by the time of the First Amendment. There is of course a large originalist debate about whether this practice of exemptions was embedded in the Free Exercise Clause.<sup>70</sup> But there is no plausible originalist debate about whether such exemptions violated the federal Establishment Clause or any state establishment clause. The founding

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<sup>67</sup> See generally West, *supra* note 43 (reviewing the debate over military service exemptions from a perspective hostile to exemptions).

<sup>68</sup> See Laycock, *supra* note 13, at 1016–18.

<sup>69</sup> See, e.g., N.H. CONST. of 1784, pt. I, art. I, § XIII (“No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent.”), reprinted in 4 LAWS OF THE STATES, *supra* note 40, at 2453, 2455; PA. CONST. of 1776, Declaration of Rights, art. VIII, reprinted in 5 LAWS OF THE STATES, *supra* note 40, at 3081, 3083; Massachusetts Act, *supra* note 63, at 49. For additional examples and discussion, see Adams & Emmerich, *supra* note 53, at 1632–33; McConnell, *supra* note 6, at 1468–69; Russell, *supra* note 63, at 414; West, *supra* note 43, at 389.

<sup>70</sup> See *supra* notes 6–7 and accompanying text.

generation was familiar with legislatively enacted exemptions for religious practice, and the states were busily engaged in disestablishing churches, but there is hardly a trace of anyone arguing that legislatively enacted exemptions were an establishment.

The principal subject of relevant debate was exemption from military service. Opponents argued that unconditional exemptions from military service were bad policy, but not that exemptions were unconstitutional or that they implicated any concern about establishment of religion. In the First Congress, the Select Committee proposed to include, in what became our Second Amendment, a clause providing that “no person religiously scrupulous shall be compelled to bear arms.”<sup>71</sup> Debating this proposal in the Committee of the Whole, Elbridge Gerry feared that government would “declare who are those religiously scrupulous, and prevent them from bearing arms.”<sup>72</sup> In this way, government might “destroy the militia, in order to raise an army upon their ruins.”<sup>73</sup> This objection seems so implausible—among other things, it would require that “compelled” be interpreted as “permitted”—as to suggest a willingness to argue just about anything in support of a reflexive opposition. But he did not argue that the proposed exemption would establish religion; that argument was apparently too implausible and unfamiliar to occur to him. The argument would not have been unfamiliar if he had heard anyone else make it. This at least suggests that no such argument was circulating in the First Congress, or in New York City (where the First Congress met), or back home in Massachusetts.

Other opponents made a variety of more plausible arguments. Mr. Jackson thought the amendment to exempt conscientious objectors “unjust,” unless those exempted were required to pay an equivalent.<sup>74</sup> Mr. Smith thought those exempted should find a substitute.<sup>75</sup> Mr. Benson moved to strike the whole clause and leave the issue to the legislature.<sup>76</sup> “I have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion.”<sup>77</sup> His motion was defeated, 24-22.<sup>78</sup>

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71 1 ANNALS OF CONG. 749 (Aug. 17, 1789) (Joseph Gales ed., 1834).

72 *Id.*

73 *Id.* at 750.

74 *Id.*

75 *Id.*

76 *Id.* at 751.

77 *Id.*

78 *Id.*

Three days later, on the floor of the House, Mr. Scott also argued that this exemption should be left to the legislature. "I conceive it, said he, to be a legislative right altogether. There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords."<sup>79</sup> The proposal was amended to read that "no person religiously scrupulous shall be compelled to bear arms *in person*," and as amended, passed by the requisite two-thirds vote.<sup>80</sup> The clause was later removed in the Senate,<sup>81</sup> where debate was not recorded.

This debate reveals opponents who wanted a more limited exemption, requiring payment of a fee or provision of a substitute. These opponents prevailed in the House, by the addition of the words "in person." The debate reveals other opponents who wanted the whole issue left to legislatures, and these opponents appear to have prevailed in the Senate. But the recorded debate contains no suggestion that legislative exemptions were in any way constitutionally suspect. There is no hint in this debate of any issue concerning establishment of religion.

Debate was far more prolonged in Pennsylvania, where Quakers and other peace churches were a substantial minority.<sup>82</sup> And that debate is unusually well preserved, because local political practice put so much in writing—in long petitions to the legislative Assembly and in the exchange of formal messages, elaborating each side's arguments, between the governor and the Assembly.

Quakers and their political allies, including nonpacifists who supported what came to be known as the Quaker party, controlled the Pennsylvania Assembly well into the second half of the eighteenth century.<sup>83</sup> Quaker refusal to create a militia was a recurring issue, be-

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79 *Id.* at 767 (Aug. 20, 1789).

80 *Id.* (emphasis added). The only other recorded statements are those of Mr. Sherman, *id.* at 750, Mr. Vining, *id.* at 751, and Mr. Boudinot, *id.* at 767, all supporting the exemption as proposed, and Mr. Stone, who thought the text should clarify "what the words 'religiously scrupulous' had reference to," *id.* at 751.

81 See 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 136, 154 (Linda Grant De Pauw ed., 1972) (showing proposed fifth Article of Amendment as received from House, with exemption from bearing arms (Aug. 25, 1789), and as passed by Senate, amended to omit exemption from bearing arms (Sept. 4, 1789)).

82 See RICHARD K. MACMASTER ET AL., CONSCIENCE IN CRISIS 50–55 (1979). Analyzing the available data sets, none of which is complete, MacMaster concludes that members of the peace churches were something under a quarter of Pennsylvania's population in the decade before the Revolution, *id.* at 52, and a somewhat larger percentage of voters, *id.* at 52–54.

83 See FROST, *supra* note 42, at 64.

cause of Indian raids on the frontier and also because of the risk of invasion during Britain's intermittent wars with other European powers. The issue periodically became acute, most notably in 1739, when the Crown wanted colonial troops for the War of Jenkins' Ear;<sup>84</sup> in 1747, toward the end of King George's War;<sup>85</sup> in 1755, at the outbreak of the French and Indian War;<sup>86</sup> and in 1775, at the outbreak of the Revolution.<sup>87</sup> Quakers demanded an unconditional exemption from military service, and some Quakers refused to pay taxes too closely linked to the war effort.<sup>88</sup> The nonpacifists, long a majority of the population and a strong majority in the revolutionary Assembly, were willing to offer exemption only from military service, and only on condition that those exempted do something else instead—usually pay additional sums of cash to support the war effort. These disputes over the militia and conscription provoked a long political battle, which the Quakers finally lost in 1775 and later.

In the years before 1755, and to a declining extent thereafter, the Quaker party controlled the Assembly and refused to create any form of organized militia. Nonpacifists attacked this policy on many grounds, including one that might be understood as an argument about establishment of religion: "No governor objected to the conscientious scruples of Friends, but all insisted that Friends did not have

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84 This was a colonial war between England and Spain, fought over trade and influence in the Caribbean; the precipitating excuse was the action of Spanish privateers who seized the ship of an English smuggler, Captain Robert Jenkins, and cut off one of his ears as a warning to others. See REED BROWNING, *THE WAR OF THE AUSTRIAN SUCCESSION* 23–24 (1993); MACMASTER ET AL., *supra* note 82, at 61–62.

85 This was the American name for the colonies' part in a much larger war that historians eventually named the War of the Austrian Succession. See EDMUND S. MORGAN, *BENJAMIN FRANKLIN* 63 (2002) (equating the two names); BROWNING, *supra* note 84, at xii (noting that the modern name dates from the nineteenth century). Arising out of long-lasting strategic conflicts among the great European powers, *id.* at 26–33, the war lasted nearly eight years and is estimated to have killed half a million people, *id.* at 365, 375–77.

86 See, e.g., WILLIAM M. FOWLER, JR., *EMPIRES AT WAR: THE FRENCH AND INDIAN WAR AND THE STRUGGLE FOR NORTH AMERICA, 1754–1763* (2005). Fought in North America for imperial control of the eastern half the continent, this war was also part of a larger European conflict, known in Europe as the Seven Years War. *Id.* at 1.

87 See, e.g., ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE* (1982). For discussion of the disputes between pacifist and nonpacifist Pennsylvanians associated with these wars, see FROST, *supra* note 42, at 29–32, 36–38, 41, 62; MACMASTER ET AL., *supra* note 82, at 31–32, 61–83, 165–68, 213–23, 278–300; Philip Hamburger, *Religious Freedom in Philadelphia*, 54 *EMORY L.J.* 1603 (2005); West, *supra* note 43, at 385–87, 389–90.

88 See FROST, *supra* note 42, at 39; MACMASTER ET AL., *supra* note 82, at 29–30, 33–34, 78–81, 221, 354–64. Illustrative petitions for exemption from war taxes are reprinted in MACMASTER ET AL., *supra* note 82, at 113–15.

the right to impose their practices and beliefs upon others.”<sup>89</sup> On first encountering this argument in the secondary literature, I thought it analogous to modern arguments that laws corresponding to religious teachings violate the Establishment Clause. After finally tracking this argument down in original sources, I think that this is mostly not what the Quaker’s critics were saying. Most of the time, their argument sounded much more in policy than in religion. Defense was a necessity, so Quaker peace principles were bad policy, and the whole colony was stuck with this bad policy because of the religious scruples of those in political power.<sup>90</sup> But at least one pamphleteer, expounding on this political theme, did implicitly accuse the Quakers of acting like an established church:

[Y]ou see that our Assembly are, and have always been *Quakers*, and that they are still *principled* against bearing Arms. What can be more absurd than such a Declaration from those who are in the room of our *Protectors*? That which is the chief Design of Government, they declare they can have nothing to do with! . . . [The Quakers say that ] we will not provide for [the Province’s] Safety, as other Provinces have done for theirs, by compulsive Methods, nor depart one Jot from our Principles, if it were to save it from Destruction. Neither will we give up the Government to others who would take Care of its Defence; for the Laws are all *ours*, the Country is *ours*; and tho’ it be true that great Numbers of People, of other religious Denominations, are come among us, yet they came by our *Toleration*.

And now what more need be said to shew how unjustly this Province is swayed by a Faction, and sacrificed to their separate Interests. Our very Laws themselves breathe the Spirit, and speak the Language, of a Faction, who tell us that we are all *tolerated* only by

89 FROST, *supra* note 42, at 30; *see also id.* at 36; West, *supra* note 43, at 386–87.

90 See Message to the Assembly from Governor George Thomas (Jan. 10, 1740), in 3 PENNSYLVANIA ARCHIVES (8TH SERIES) 2535, 2535 (Gertrude MacKinney ed., 1931) [hereinafter ARCHIVES] (“I must lament the unhappy Circumstances of a Country, populous indeed, extensive in its Trade, blessed with many natural Advantages, and capable of defending itself; but from a religious Principle of its Representatives against bearing of Arms, subject to become the Prey of the first Invader”); Message from Governor George Thomas (Jan. 23, 1740), in 3 ARCHIVES, *supra*, at 2547, 2551 (“The Demeanor of the People called *Quakers*, may have merited the Protection of the Crown, and the Esteem of Mankind; and I believe this is the first Instance, of a Number of them made use of Liberty of Conscience for tying up the Hands of his Majesty’s Subjects, from defending a valuable Part of his Dominions”). I do not mean to imply that Professor Frost misread the sources. Rather, I misread Professor Frost; because he and I were focused on somewhat different questions, I read more into his paraphrase than he had intended. Professor West closely tracks Professor Frost on this point, and I probably misread him as well.

their Grace and Favour. And yet these high and mighty Lords, who speak so loudly of *tolerating* others, can plead no Establishment in their own Behalf.<sup>91</sup>

Even this passage seems more concerned with faction than with establishment. But assuming it is not anachronistic to read this passage as including an argument about establishment, it is an argument that the modern courts have uniformly rejected.<sup>92</sup> There is an ill-defined point at which the state would be unconstitutionally compelling religious worship or observance of religious ritual,<sup>93</sup> but short of that, the Court's view has been that the state is simply regulating behavior within its power to regulate and that it is irrelevant if such regulation corresponds with the moral views of one or more religions. So any Establishment Clause implications of this anti-Quaker argument went well beyond modern Establishment Clause doctrine.

But more fundamentally, even if this is an Establishment Clause argument, it is not an Establishment Clause argument *about exemptions*. The refusal to create a militia was in no sense a policy of exemption; it was an enactment of Quaker policy for everyone, and this imposition of the views of one faith was precisely the point of the establishment-sounding attack on the colony's policy.

The argument against the Quakers' refusal to create a militia is more akin to an argument *for* exemptions—adherents of faiths that were willing to fight should be exempt from the general policy of pacifism. But this would not be a standard-form argument for exemption. It seems unlikely that many Anglicans or Presbyterians felt *religiously* compelled to fight, although people may have talked themselves into this position. The preamble to the 1755 militia law, drafted by Benjamin Franklin,<sup>94</sup> recites that "some" members of nonpacifist denominations "think it their Duty to fight in defense of their Country, their Wives, their Families and Estates, and such have an Equal Right to

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91 WILLIAM SMITH, A BRIEF VIEW OF THE CONDUCT OF PENNSYLVANIA, FOR THE YEAR 1755, at 75 (London, R. Griffiths 1756), available at Infotrac, Gale Doc. No. CW3302956857. Smith was a politically active Anglican priest. See FROST, *supra* note 42, at 49–50.

92 See *Harris v. McRae*, 448 U.S. 297, 319–20 (1980) (holding that refusal to fund abortions is not an establishment); *McGowan v. Maryland*, 366 U.S. 420, 444 (1961) (holding that Sunday closing laws are not an establishment); *Clayton v. Place*, 884 F.2d 376, 379–81 (8th Cir. 1989) (holding that school's refusal to sponsor or permit dances is not an establishment).

93 The line between regulating behavior and mandating religious observance is briefly discussed in Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 812–13 (1996).

94 See FROST, *supra* note 42, at 39.

Liberty of Conscience with others.”<sup>95</sup> In any event, no law prevented individuals from fighting back when attacked, or even from organizing themselves into voluntary militias;<sup>96</sup> what was wanted was an organized defense, which required affirmative government conduct and not merely an exemption from regulation.<sup>97</sup> So the analogy is quite imperfect. But to the extent the argument was that the politically dominant Quakers should not force religious minorities to conform to a Quaker policy of pacifism, that is closely akin to arguing that religious minorities should have been exempt from the existing law.

At the outbreak of the French and Indian War, Quakers still held a majority in the Assembly,<sup>98</sup> but the refusal to provide a militia became politically untenable.<sup>99</sup> And Quakers were unwilling to conscript others while exempting themselves; the Franklin-drafted preamble recited that such a law would be “inconsistent and partial,”<sup>100</sup> and many Quaker legislators appear to have believed that voting to conscript anyone would violate their conscience.<sup>101</sup> The

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95 An Act for the Better Ordering and Regulating Such as Are Willing and Desirous To Be United for Military Purposes Within This Province, ch. 405 (1755) [hereinafter 1755 Act], reprinted in 5 PA. STAT., *supra* note 41, at 197 (William Stanley Ray 1898). The Act is partially reprinted in MACMASTER ET AL., *supra* note 82, at 115–17.

96 See FROST, *supra* note 42, at 31, 34–35 (summarizing the Quaker arguments).

97 See Message to the Assembly from Governor George Thomas (Jan. 10, 1740), in 3 ARCHIVES, *supra* note 90, at 2535, 2537 (“An Officer without legal Authority, and Men under no legal Obligations, may indeed exhibit a pretty piece of Pageantry for a little Time, but can be of no real Service in the Defence of a Country.”); Message to the Assembly from Governor George Thomas (Jan. 23, 1740), in 3 ARCHIVES, *supra* note 90, at 2547, 2551 (“[N]o more than two or three Hundred Men appeared under Arms in the Time of a former Governor, and . . . even that Number may not be persuaded to do it now as they see no Probability of being servicable to their Country, for want of being put under proper Regulations by Law.”); Message to the Assembly from Governor Robert Hunter Morris (Nov. 3, 1755), in 5 ARCHIVES, *supra* note 90, at 4094, 4095 (“The People in the Back Counties have on this important Occasion behaved themselves with uncommon Spirit and Activity; but complain much of the Want of Order and Discipline, as well as of Arms and Ammunition.”); A Representation to the General Assembly of the Province of Pennsylvania, by Several of the Principal Inhabitants of the City of Philadelphia, in Said Province (Nov. 11, 1755), in 5 ARCHIVES, *supra* note 90, at 4115, 4116 (“[I]t would neither be adviseable for the Sake of such Men themselves, nor yet for the Sake of *Public Liberty*, to keep up an armed Force in the Country, without the Sanction and Authority of Law.”); *id.* at 4117 (“[N]o Sums of Money, however great, will answer the Purpose of Defence, without such a Law as we desire.”). Each quotation is taken from a longer passage elaborating the theme.

98 See FROST, *supra* note 42, at 39.

99 See West, *supra* note 43, at 386–87.

100 1755 Act, *supra* note 95, at 197.

101 See FROST, *supra* note 42, at 38–39; SMITH, *supra* note 91, at 76.

Quakers' remarkable proposed solution was a private and voluntary militia. The Act provided that it would henceforth be lawful "for the freemen of this province to form themselves into companies, as heretofore they have used in time of war without law,"<sup>102</sup> and went on to provide for the governance and regulation of this militia, authorizing election of officers, articles of war, and courts martial,<sup>103</sup> and exempting all "who are conscientiously scrupulous of bearing arms," and "any other persons of what persuasion or denomination soever who have not first voluntarily signed the said articles after due consideration."<sup>104</sup> This voluntary militia comes considerably closer to a broadly applicable legislative exemption from the official pacifist policy.

This compromise satisfied neither the pacifists nor their opponents.<sup>105</sup> In 1756, after the delays incident to trans-Atlantic communication, the Crown "repealed" (that is, vetoed) the Act as ineffectual.<sup>106</sup> The Quaker Yearly Meeting condemned Quaker legislators for sacrificing conscience to retain power, urging them to resign.<sup>107</sup> After 1756, there was never again a Quaker majority in the Assembly.<sup>108</sup> But the Quaker party, now consisting of "political Quakers" who disregarded the Meeting's advice to withdraw, other pacifists, and their nonpacifist allies, continued to control the Assembly until the Revolution,<sup>109</sup> making ever greater efforts to satisfy the political pressure for an effective military defense.<sup>110</sup>

The Assembly tried again in 1757. This time it enacted conscription, with an exemption for conscientious objectors, provided that objectors either pay a fine of twenty shillings or perform such alternative

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102 1755 Act, *supra* note 95, at 198.

103 *Id.* §§ 1–2, at 198–200.

104 *Id.* § 2, at 200.

105 See FROST, *supra* note 42, at 39.

106 The fact of the veto appears in a note to 1755 Act, *supra* note 95, at 201. For the veto message, see 6 ARCHIVES, *supra* note 90, at 4394–95 (Charles F. Hoban ed., 1935).

107 See FROST, *supra* note 42, at 39.

108 *Id.*

109 See *id.* at 32, 39, 60.

110 *Id.* at 62 ("The Quaker party survived until 1776 only by repudiating the goals of the Society of Friends."). Another commentator has suggested a more complicated story—that the Quakers who left politics expanded the reach of the peace teaching while the political Quakers emphasized other Quaker teachings. Quaker teaching on pacifism conflicted with Quaker teaching on the government's duty to defend the people, and this conflict became most apparent where Quakers controlled the government. For an account of the Quakers' evolving efforts to resolve this conflict, and the deep split that emerged by the middle of the eighteenth century, see Hermann Wellenreuther, *The Political Dilemma of the Quakers in Pennsylvania, 1681–1748*, 94 PA. MAG. HIST. & BIOGRAPHY 135 (1970).



service as extinguishing fires, suppressing slave insurrections, caring for the wounded, conveying messages, and taking women, children, the infirm, or threatened property to places of safety.<sup>111</sup> This time the governor vetoed the bill as ineffectual, and the provision for alternative service did not reappear in any subsequent legislation.<sup>112</sup>

Meanwhile, militia supporters worked to make something useful out of a voluntary and legally unauthorized militia. In 1747, with French privateers raiding on the lower Delaware and reports of a French invasion planned for the following summer,<sup>113</sup> Benjamin Franklin had successfully urged the creation of an "Association" of persons willing to defend the colony.<sup>114</sup> He organized a lottery to raise funds for fortifications, and solicited artillery from other colonies.<sup>115</sup> The resulting Association was disbanded when King George's War ended in 1748.<sup>116</sup>

In the French and Indian War, there were again volunteer units modeled on the Association, and the governor commissioned officers for these troops, relying on authority granted to William Penn in the colony's original charter.<sup>117</sup> The governor emphasized the limited scope of this authority, warning the Assembly: "I have neither Money, Arms or Ammunition at my Disposal; all I have therefore been able to do has been to issue Commissions to such as were willing to take them, and to encourage the People to defend themselves and their Families till the Government was enabled to protect them."<sup>118</sup> The

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111 An Act for Forming and Regulating the Militia Within this Province (1757), reprinted in MACMASTER ET AL., *supra* note 82, at 117, 119. This legislation does not appear in the Pennsylvania Statutes at Large, presumably because the governor never signed the bill.

112 See MACMASTER ET AL., *supra* note 82, at 117.

113 See MORGAN, *supra* note 85, at 65.

114 See *Plain Truth: Or, Serious Considerations on the Present State of the City of Philadelphia, and Province of Pennsylvania* 19–22 (1747), available at Infotrac, Gale Doc. No. CW3304472384. For discussion, see EDWIN S. GAUSTAD, BENJAMIN FRANKLIN 52–54 (2006); MACMASTER ET AL., *supra* note 82, at 68–71; MORGAN, *supra* note 85, at 65–70.

115 See GAUSTAD, *supra* note 114, at 53–54; MORGAN, *supra* note 85, at 67–68.

116 See MACMASTER ET AL., *supra* note 82, at 71.

117 See FROST, *supra* note 42, at 40 (describing the volunteers); An Act for Regulating the Officers and Soldiers Commissioned and Raised by the Governor for the Defense of This Province, ch. 409 (1756) [hereinafter 1756 Act], reprinted in 5 PA. STAT. (William Stanley Ray 1898), *supra* note 41, at 219. The governor's action and the source of his authority are recited in the preamble. *Id.* at 219–20.

118 Message to the Assembly from Governor Robert Hunter Morris (Nov. 3, 1755), in 5 ARCHIVES, *supra* note 90, at 4095.

Assembly now acted to provide regulations and funds for these troops,<sup>119</sup> but it did not enact any further militia legislation.

When the Revolution came, the issue was squarely posed. National existence was at stake; Quakers were a highly visible and affluent minority, suspected of Toryism;<sup>120</sup> in their resistance to war, some of them made statements supporting the Crown.<sup>121</sup> The British threatened Philadelphia by late 1776, and captured the city in 1777.<sup>122</sup> Many pacifists were disfranchised for refusing to pay taxes or affirm loyalty to the revolutionary government, effectively excluding Quakers from the Assembly.<sup>123</sup> There was hostility to pacifists and episodes of harsh treatment.<sup>124</sup> Political conditions could not have been worse for a claim of exemption from military service. Yet the basic exemption survived.

Pennsylvania's initial response was to support the Association, turning it into a de facto state-sponsored militia. On the question of who should serve, the state adopted an exemption from service in the Association on condition of paying a monetary "equivalent."<sup>125</sup> The Assembly initially resolved that all white males between the ages of sixteen and fifty, "not scrupulous of bearing arms," should be urged "to join the said Association immediately," and that those "who shall not associate for the Defence of this Province, ought to contribute an equivalent to the Time spent by the Associators in acquiring the military Discipline."<sup>126</sup> Not quite three weeks later, the Assembly enacted "Rules and Regulations for the Better Government of the Military As-

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119 See, e.g., 1756 Act, *supra* note 117, at 219; An Act for Striking the Sum of Thirty Thousand Pounds in Bills of Credit and Giving the Same to the King's Use, and for Providing a Fund To Sink the Bills so To Be Emitted by Laying an Excise upon Wine, Rum, Brandy and Other Spirits, ch. 411 (1756), *reprinted in* 5 PA. STAT. (William Stanley Ray 1898), *supra* note 41, at 243.

120 See FROST, *supra* note 42, at 63, 66–67; Hamburger, *supra* note 87, at 1609. The pacifist Mennonites were also seen as affluent. See MACMASTER ET AL., *supra* note 82, at 46–47.

121 See Hamburger, *supra* note 87, at 1623–24.

122 For the threat to Philadelphia in December 1776, see DAVID McCULLOUGH, 1776, at 263–64 (2005). For the capture and occupation of the city from September 1777 to May 1778, see MIDDLEKAUFF, *supra* note 87, at 355, 389–91, 420, 541–44.

123 See FROST, *supra* note 42, at 67–69.

124 See MACMASTER ET AL., *supra* note 82, at 281, 290, 293, 397–407; West, *supra* note 43, at 393.

125 See FROST, *supra* note 42, at 62–63; West, *supra* note 43, at 390–91.

126 Resolves of the Assembly (Nov. 8, 1775), *reprinted in* 8 PA. STAT., *supra* note 41, at 492 (1902). For discussion, see MACMASTER ET AL., *supra* note 82, at 222; Hamburger, *supra* note 87, at 1622–23.

sociation in Pennsylvania,"<sup>127</sup> "Articles of Association in Pennsylvania,"<sup>128</sup> which the Assembly "earnestly recommend[ed]" that all "associators" sign,<sup>129</sup> and a special tax of two pounds and ten shillings on all white males between the ages of sixteen and fifty who failed to sign the Articles of Association.<sup>130</sup>

In 1776, at a convention almost entirely composed of the Quakers' opponents,<sup>131</sup> the revolutionaries wrote the same basic solution—conscientious objection subject to payment of an equivalent—into the state constitution:

That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent . . . .<sup>132</sup>

Over the decades of this long political battle, supporters of a militia and opponents of an unconditional exemption made a wide variety of arguments: that pacifism was a false religion, that "justice and equity" required service from all, that Quakers and their property would benefit fully from the common defense provided by others, that refusal to serve in time of war struck at "the very Existence of Civil Government," that the religious liberty guarantee in Pennsylvania's charter did not include exemption from military service, that some Quakers had paid taxes for military measures and some had even served in the military.<sup>133</sup> But I have found no mention of a claim that unconditional exemption for Quakers would establish their religion, support their religion, grant preference to their religion, or any other such formulation—not in the substantial original sources I have been

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127 Rules and Regulations for the Better Government of the Military Association in Pennsylvania (Nov. 25, 1775), 8 PA. STAT., *supra* note 41, at 499 (1902).

128 *Id.* at 506.

129 *Id.*

130 Resolutions Directing the Mode of Levying Taxes on Non-Associators in Pennsylvania § 8 (Nov. 25, 1775) [hereinafter 1775 Non-Associators Resolution], *reprinted in* 8 PA. STAT., *supra* note 41, at 512, 514 (1902).

131 See FROST, *supra* note 42, at 64–65.

132 PA. CONST. of 1776, Declaration of Rights, art. VIII, *reprinted in* 5 LAWS OF THE STATES, *supra* note 40, at 3081, 3083. For discussion of this provision, see FROST, *supra* note 42, at 65; Hamburger, *supra* note 87, at 1625–26.

133 For summaries of these debates, see FROST, *supra* note 42, at 29–43, 60–69; Hamburger, *supra* note 87, at 1615–21; West, *supra* note 43, at 390–91.

able to examine personally and not in extensive summaries and quotations by vigorous opponents of regulatory exemptions.<sup>134</sup> The many petitions opposing the pacifist position did not even oppose exemptions outright. They uniformly urged that pacifists be required to provide more financial support to the military, but *not* that they be required to *serve* in the military.<sup>135</sup>

Because the Quakers ultimately got considerably less than they demanded, some opponents of exemptions claim the outcome in Pennsylvania as a victory that shows the founding generation's opposition to exemptions.<sup>136</sup> But this badly mischaracterizes the political outcome—pacifists were in fact exempted from military service. To pay a financial “equivalent” was a burden, both on conscience and on the pacifists' secular interests. But it was much less of a burden on either than actual military service with the risk of killing or of being killed. That is the commonsense understanding both in our time and in theirs. Certainly in my generation, which was draft eligible during the Vietnam War, both the government and potential draftees viewed conscientious objector status as a real exemption, worth determined litigation,<sup>137</sup> despite the burdens of alternative service. The Court upheld statutory provisions awarding educational benefits to military veterans but not to those who performed civilian alternative service, explaining in part that the burdens of military service were much greater.<sup>138</sup> And Justice Harlan, who had some sympathy with the argument that exemptions are an establishment, viewed conscientious objector status as a real exemption that squarely raised the

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134 See Hamburger, *supra* note 87, at 1608–12, 1615–26; West, *supra* note 43, at 390–91.

135 For petitions against the pacifist position, see 8 ARCHIVES, *supra* note 90, at 7259–60, 7311–13, 7333–43, 7396–7410, 7422–23, 7425–26 (Charles F. Hoban ed., 1935). Some of these petitions, and other similar petitions, are reprinted in MACMASTER ET AL., *supra* note 82, at 246–47, 260–66, 307–10. Some are quoted in the paragraphs that follow.

136 See Hamburger, *supra* note 87, at 1604–05, 1630–31; West, *supra* note 43, at 381–82.

137 See, e.g., Clay v. United States, 403 U.S. 698 (1971) (reviewing conviction of Muhammad Ali for failing to report for induction after erroneous denial of conscientious objector claim). A Westlaw search for “selective service” and “conscientious objector” between 1964 and 1975, inclusive, reveals 32 cases in the Supreme Court and 1,389 in the “All Federal Cases” database.

138 See Johnson v. Robison, 415 U.S. 361, 378–82 (1974) (noting the rigors of military discipline and potential hazards of military duty).

Establishment Clause issue,<sup>139</sup> despite the requirement of alternative service.

The revolutionary generation took a similar view. A petition of officers of the Philadelphia Association, demanding that conscientious objectors pay an equivalent, argued that pacifists “may be exempted from actually bearing Arms; (and in such Case by paying a Fine for such Exemption, he is in a better Situation than one who risks his Life in the Service).”<sup>140</sup> A month earlier these officers had argued that nonpacifists would find it more attractive to pay the equivalent than to serve in person: “People *sincerely* and *religiously* scrupulous are but few in Comparison to those who upon this Occasion, as well as others, make *Conscience* a *Convenience*.”<sup>141</sup> A different group of officers in 1776 argued that an Associator must pay for his own equipment and “risk his Life,” so that even with the equivalent, the non-Associator had such a “great Advantage . . . in Point of Interest [that it] would entirely defeat the Association, if the People in general were not actuated by a patriotic Spirit.”<sup>142</sup> The privates of the Philadelphia Association, in a petition endorsed by their officers,<sup>143</sup> argued that “no Terms of Exemption, affecting Property meerly, can be deemed equal to the Risks and Dangers to which they expose themselves who are under the most solemn Engagements of Honour and Duty to lay down their Lives, if necessary, in Defence of their Country.”<sup>144</sup>

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139 See *Welsh v. United States*, 398 U.S. 333, 355–61 (1970) (Harlan, J., concurring); see also *infra* notes 246–250 and accompanying text (discussing *Welsh*).

140 A Memorial of the Officers of the Military Association of the City and Liberties of Philadelphia (Oct. 31, 1775) [hereinafter Memorial of the Officers], in 8 ARCHIVES, *supra* note 90, at 7337, 7339 (Charles F. Hoban ed., 1935).

141 Memorial from the Officers of the Military Association for the City and Liberties of Philadelphia (Sept. 27, 1775), in 8 ARCHIVES, *supra* note 90, at 7259, 7259 (Charles F. Hoban ed., 1935).

142 The Petition of Mark Bird, Daniel Broadhead, Balsar Geehr and Jonathan Potts, Esquires, Field-Officers in the Several battalions in Berks County, in Behalf of Said Battalions (Feb. 23, 1776), in 8 ARCHIVES, *supra* note 90, at 7399 (Charles F. Hoban ed., 1935).

143 The Memorial of the Officers of the Military Association of the City and Liberties of Philadelphia (Feb. 17, 1776), in 8 ARCHIVES, *supra* note 90, at 7407 (Charles F. Hoban ed., 1935) (“*Sheweth*, THAT your Memorialists have perused, at the Request of the private Associators of this City and Liberties, their Petition to your Honourable House, and concur with them in the Sentiments therein contained.”).

144 The Petition of the Privates of the Military Association of the City and Liberties of Philadelphia (Feb. 17, 1776) [hereinafter Petition of the Privates], in 8 ARCHIVES, *supra* note 90, at 7402, 7403 (Charles F. Hoban ed., 1935).

The financial equivalent was increased in response to such concerns, first to three pounds and ten shillings per year<sup>145</sup> and then to double the normal rate of property tax.<sup>146</sup> Double property-tax was imposed not just on conscientious objectors, but on “every person not subject to nor performing military duty”—thus including those who were too old or disabled to serve—with exceptions for public officials, clergy, and nuclear families with a member already serving or killed or captured.<sup>147</sup> These taxes were substantial, but they were not designed to stamp out sincere claims of conscience. The privates of the Philadelphia Association argued that “the Terms imposed upon Non-Associators should be such as to induce every Man of suitable Age and Strength (*not truly conscientiously scrupulous*) to join in the Association.”<sup>148</sup> Scholars who have studied the question conclude that the vast majority of members of the peace churches refused to serve,<sup>149</sup> and that most of those who did serve were attracted early by the revolutionary cause, not coerced later by threats of fines.<sup>150</sup>

Nor did opposition to military exemptions necessarily entail opposition to all exemptions. For reasons already stated,<sup>151</sup> military exemption is one of the hardest cases. Opposition to exemption in the hardest case does not imply opposition in easier cases. This core of this rather obvious idea appears in a statement of Rev. Francis Alison, a mid-century Presbyterian leader. (Presbyterians tended to live on the frontier, and had much at stake in opposition to pacifism.<sup>152</sup>) In a 1756 sermon, Alison said that “[a]ll . . . should have a free use of their religion, but so as not on that score to burden or oppress others.”<sup>153</sup> This statement does not take a clear position on regulatory exemp-

145 See Resolutions Directing the Mode of Levying Taxes on Non-Associators § 8 (Apr. 5, 1776) [hereinafter 1776 Non-Associators Resolution], *reprinted in* 8 PA. STAT., *supra* note 41, at 538, 540–41 (1902).

146 See An Act for Making More Equal the Burden of the Public Defense and for Filling the Quota of Troops To Be Raised in This State, ch. 773, § 1 (1777), *reprinted in* 9 PA. STAT., *supra* note 41, at 167 (1903).

147 See *id.* § 3.

148 Petition of the Privates, *supra* note 144, at 7404 (emphasis added).

149 See MACMASTER ET AL., *supra* note 82, at 300 (estimating that ninety-five percent of Mennonites and Amish refused to serve, and that all the peace churches refused to serve “with a degree of unanimity that would never be matched again in any American war”); *id.* at 525 (reporting that Quaker meetings disowned Quakers who served, and that those disowned for this cause were “an insignificant minority”); FROST, *supra* note 42, at 67 (stating that “a few Quakers” dissented from the teaching on military service).

150 See MACMASTER ET AL., *supra* note 82, at 525.

151 See *supra* notes 67–68 and accompanying text.

152 See FROST, *supra* note 42, at 51.

153 *Id.* (quoting Alison’s 1756 “Love of Country” sermon).

tions either way, but it does draw the essential distinction: protect religious liberty up to the point at which it burdens or oppresses others, and no further. Some exemptions burden or oppress others; many do not. The privates of the Philadelphia Association illustrated the distinction neatly; they wanted “all Persons alledging Scruples of Conscience” to take “a Test by Oath or Affirmation” to prove their sincerity.<sup>154</sup> So they demanded an equivalent for exemption from military service, but were entirely comfortable with the exemption from taking oaths. Similarly, when the state’s revolutionary government imposed a loyalty oath, it provided for oath or affirmation.<sup>155</sup> More remarkably, Pennsylvania provided for conscientious objection by tax assessors—public officials—who were subject to a fine of up to ten pounds for failing to compile lists of white males of military age, “unless such assessor’s refusal proceeds from conscientious motives.”<sup>156</sup>

Those who demanded an equivalent for military exemption in Pennsylvania had to argue that the colony’s Charter of Privileges<sup>157</sup> did not guarantee exemption without an equivalent. Even in that context, most of their arguments focused on the special cost of exemption from military service, and not on disputing a right to exemptions more generally. A revolutionary committee of Philadelphia argued that “Self-preservation is the first Principle of Nature,” “that the Safety

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154 Petition of the Privates, *supra* note 144, at 7406.

155 See An Act for the Further Security of the Government, ch. 796 (1778), reprinted in 9 PA. STAT., *supra* note 41, at 238 (1903); An Act Obliging the Male White Inhabitants of This State To Give Assurances of Allegiance to the Same and for Other Purposes Therein Mentioned, ch. 756 (1777), reprinted in 9 PA. STAT., *supra* note 41, at 110 (1903). The oath or affirmation required by the 1778 Act is reprinted in FROST, *supra* note 42, at 67.

156 See 1776 Non-Associators Resolution, *supra* note 145, § 2, at 538, 540–41; 1775 Non-Associators Resolution, *supra* note 130, at 512, 514. The county commissioners were then to appoint “some other proper person” to make out the list. See § 3 of each Resolution.

157 Charter of Privileges Granted by William Penn, Esq. to the Inhabitants of Pennsylvania and Territories art. I (1701), reprinted in 5 LAWS OF THE STATES, *supra* note 40, at 3076, 3077. This guarantee stated:

I do hereby grant and declare, That no Person or Persons, inhabiting in this Province or Territories, who shall confess and acknowledge *One* almighty God, the Creator, Upholder and Ruler of the World; and profess him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their religious Persuasion.

of the People is the supreme law,” and “that the Doctrine of Passive Obedience and Non-resistance is incompatible with our Freedom and Happiness.”<sup>158</sup> The Philadelphia privates argued “that the great Law of Self-preservation is equally binding with the Letter of written Charters.”<sup>159</sup> They also said:

Liberty of Conscience is so sacred a Thing that it ought ever to be preserved inviolate, and we will always rejoice to see any Body of Men assert their Right to it. But when, under Pretence of this Liberty the very Existence of Civil Government is struck at, we beg Leave to represent that either the Liberty claimed must be given up or the Government dissolved.<sup>160</sup>

In modern doctrinal terms, all these arguments would fit comfortably under the rubric of asserting a compelling governmental interest in military service. The Philadelphia privates also offered a textual basis for this argument. In the paragraph following the passage just quoted, they noted that the persons protected by the charter’s religious liberty clause “are by that very Clause made to ‘profess themselves obliged to live quietly under the civil Government,’ which cannot possibly be when they refuse to support the Measures often necessary to its very Existence.”<sup>161</sup> Professor Hamburger reads this as embracing his argument that any violation of law was a breach of peace that overrode state guarantees of religious liberty in the Founding era.<sup>162</sup> Perhaps there were Philadelphians who would have accepted that argument, but that is not the argument the privates made. The privates’ argument did not concern just any breach of peace, but only the refusal to support measures necessary to the government’s “very existence.”

There was also a textual argument that the religious liberty provision in Pennsylvania’s charter could not be read to guarantee exemption from military service, because the colony’s original charter authorized William Penn to “levy, muster and train all Sorts of Men, of what Condition soever, . . . and to make War,” and to do these things at a time when it was anticipated that Quakers would be the principal

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158 The Petition and Remonstrance of the Committee of the City and Liberties of Philadelphia (Oct. 31, 1775) [hereinafter City Committee], in 8 ARCHIVES, *supra* note 90, at 7334, 7336 (Charles F. Hoban ed., 1935).

159 A Representation from the Committee of Privates of the Association Belonging to the City of Philadelphia, and Its Districts (Oct. 31, 1775) [hereinafter Representation of the Privates], in 8 ARCHIVES, *supra* note 90, at 7339, 7341 (Charles F. Hoban ed., 1935).

160 *Id.* at 7341–42.

161 *Id.* at 7342.

162 See Hamburger, *supra* note 87, at 1620–21.



settlers in the colony.<sup>163</sup> This too is an argument that reaches only to exemption from military service.

On the other hand, one argument attacked the claim of a right to exemptions quite generally. The Philadelphia officers argued that the charter's guarantees of religious liberty "relate only to an Exemption from any Acts of Uniformity in Worship, and from paying towards the Support of other religious Establishments—than those to which the Inhabitants of this Province respectively belong."<sup>164</sup> Moreover, this narrow interpretation was arguably written into the general religious liberty clause in Pennsylvania's 1776 Constitution.<sup>165</sup> But if we are to read the references to "religious worship" in that document as a telling restriction, we must give equal weight to the elimination of any such restrictive references in Pennsylvania's 1790 Constitution.<sup>166</sup>

The argument of the officers, and the subsequent evolution of the state constitution's religious liberty clause, are relevant evidence in the originalist debate about whether Pennsylvanians in the founding generation understood free exercise of religion to include a presumptive right to exemptions. But they are no evidence at all on the principal question here—did Pennsylvanians understand the principles of disestablishment to preclude exemptions even when the political process was willing to grant them? Clearly they did not. They granted exemption from military service, on condition of a financial

163 Representation of the Privates, *supra* note 159, at 7339, 7342–43 (quoting Charter for the Province of Pennsylvania (1681), *reprinted in* 5 LAWS OF THE STATES, *supra* note 40, at 3035, 3042). Substantially the same argument appears in City Committee, *supra* note 158, at 7334, 7335.

164 Memorial of the Officers, *supra* note 140, at 7338.

165 See PA. CONST. of 1776, Declaration of Rights, art. II, ("And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship."), *reprinted in* 5 LAWS OF THE STATES, *supra* note 40, at 3081, 3082. Professor Hamburger reads this as a decisive rejection of a constitutional right to exemptions from regulation of any conduct other than worship. See Hamburger, *supra* note 87, at 1624–25. Judge McConnell finds no evidence that lawyers of the time interpreted state freedom of worship clauses more narrowly than state free exercise clauses. See McConnell, *supra* note 6, at 1461. This general religious liberty clause was separate from the clause granting exemption from military service subject to payment of an equivalent. See text accompanying *supra* note 132.

166 See PA. CONST. of 1790, art. IX, § 3 (stating "that no human authority can, in any case whatever, control or interfere with the rights of conscience"), *reprinted in* 5 LAWS OF THE STATES, *supra* note 40, at 3100. The separate provision conditionally guaranteeing exemption from military service was also retained: "Those who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service." *Id.* art. VI, § 2, *reprinted in* 5 LAWS OF THE STATES, *supra* note 40, at 3081, 3099.

equivalent, and they never questioned the exemption from oath taking even at the height of the controversy and the resulting suspicion of those who refused to serve.

Exemptions from military service were controversial, and rightly so, because those exemptions imposed serious burdens on persons outside the exempted faiths, and especially so in Pennsylvania, where Quakers and other pacifist sects were a large minority of the population. But if exemptions were in principal an objectionable preference for religion, the controversy should have extended to other exemptions as well. So far as we can tell, it did not.

States enacted other exemptions without leaving a record of similar debate. Exemptions from oath taking were not controversial by the time of the Founding. Early in Pennsylvania's history, there was substantial conflict over whether to require oaths of anybody, and then whether to exempt Quakers from that requirement, but that conflict was resolved by 1724.<sup>167</sup> The royal officials and local Anglicans insisting on oaths in those early days would not have been concerned about establishment of religion. Elsewhere in the colonies, and certainly in the period of broad movements for disestablishment, "oath taking never became a serious source of conflict with the authorities."<sup>168</sup> This absence of recorded controversy is evidence that no substantial body of opinion thought that exemptions from oath-taking raised an issue of establishment.

With respect to the exemptions from paying taxes for the established church, the focus of debate was on whether the tax should be continued at all, whether members of minority faiths should have to pay taxes to their own church, and whether the exemptions were fairly administered.<sup>169</sup> No one appears to have thought that exemptions made things worse, or that exemptions established a religion. The question was whether exemptions were enough.

### B. *Judicial Debates*

Early in the nineteenth century, there was litigation over constitutional claims to exemptions not enacted by the legislature. Here too I have found almost no evidence of anyone arguing that exemptions established religion. Some lawyers argued against exemptions, and some judges ruled against exemptions, but only one lawyer appears to have argued—briefly and unsuccessfully—that exemptions might violate a state or federal establishment clause.

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167 See FROST, *supra* note 42, at 23–25.

168 CURRY, *supra* note 23, at 81.

169 See *id.* at 163–92; Esbeck, *supra* note 45, at 1434–37, 1440–47.

John Gibson, Chief Justice of Pennsylvania, whose opinions are commonly cited as early rejections of any claim to a constitutional right to regulatory exemptions, said clearly that such exemptions could be allowed by legislators, or even by judges in cases properly within judicial discretion. In *Philips v. Gratz*,<sup>170</sup> a Jewish plaintiff sought a continuance when his case was called for trial on Saturday.<sup>171</sup> The motion was denied, the case was tried, and plaintiff appealed.<sup>172</sup> Chief Justice Gibson wrote:

The religious scruples of persons concerned with the administration of justice will receive all the indulgence that is compatible with the business of government; and had circumstances permitted it, this cause would not have been ordered for trial on the Jewish Sabbath. But when a continuance for conscience' sake is claimed as a right, and at the expense of a term's delay, the matter assumes a different aspect.<sup>173</sup>

He thus held that the state constitution did not *require* exemption, but he was equally clear in his view that it did not *prohibit* exemption. He made the same point later in the opinion, criticizing a New York decision protecting the confidentiality of a Catholic confession.<sup>174</sup> Chief Justice Gibson said he supported "the policy of protecting the secrets of auricular confession. But considerations of policy address themselves with propriety to the legislature, and not to a magistrate."<sup>175</sup>

Counsel for the defendant, arguing against the exemption, did not claim otherwise. They urged that an exemption would be unworkable, and that the constitutional guarantee of religious liberty was confined to "faith and religious worship" and did not affect "performance of a civil duty."<sup>176</sup> But they did not suggest that an exemption would establish anyone's religion.

Similarly in other cases, to the extent we have either an opinion of the court or an argument of counsel opposing a claimed exemption, there is little suggestion that the legislature could not provide exemptions or that such legislative exemptions would establish a relig-

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170 2 Pen. & W. 412 (Pa. 1831).

171 *Id.* at 412.

172 *Id.* at 412-13.

173 *Id.* at 416.

174 *Id.* at 417.

175 *Id.*

176 *Id.* at 415. They made this argument under the 1790 constitution, which had eliminated the language that seemed to expressly limit protection to worship. *See supra* notes 165-66 (comparing the text of Pennsylvania's 1776 and 1790 constitutions).

ion. In *Commonwealth v. Wolf*,<sup>177</sup> the Pennsylvania Supreme Court affirmed the conviction of a Jew for working on Sunday.<sup>178</sup> The court rejected his claim that the conviction violated his religious liberty,<sup>179</sup> principally on the ground that despite his contrary representations, his religion did not require him to work on Sunday. Nothing in the opinion hints that a contrary judgment would have established a religion.

In *Commonwealth v. Drake*,<sup>180</sup> an early Massachusetts case, a criminal defendant sought a new trial on the ground that the state had introduced evidence of his penitential confession to members of his church.<sup>181</sup> The state successfully argued that the confession was voluntary and reliable, that it had not been required by any ecclesiastical rule of his faith, and that its admission in evidence violated “no legal or constitutional principle.”<sup>182</sup> The state did not argue, and the court did not suggest, that a rule excluding the evidence would establish a religion.

In *State v. Willson*,<sup>183</sup> defendant refused to serve on a grand jury. The case appears to have been a test case on behalf of a Christian denomination known as Covenanters, who viewed jury service as an offense to God. We do not have the argument for the state, and there may not have been one. South Carolina’s Constitutional Court of Appeals rejected defendant’s claim, principally on the ground that it would be impossible to detect false claims, so that the benefit of exemptions would be “not so much for the scrupulous as for those who have no scruples.”<sup>184</sup> There is no hint of an Establishment Clause argument, and the negation of such an argument is implied: the court spoke with apparent approval of cases in which members of the sect appeared for duty, and “were readily excused” when the court found that more than enough jurors were available.<sup>185</sup>

The only exception I have encountered is a brief and conclusory passage in the prosecutor’s argument in *People v. Philips*.<sup>186</sup> This is the

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177 3 Serg. & Rawle 48 (Pa. 1817).

178 *Id.* at 48–50.

179 *Id.* at 49–50.

180 15 Mass. 161 (14 Tyng) (1818).

181 *Id.* at 161.

182 *Id.* at 162.

183 13 S.C.L. (2 McCord) 393 (1823).

184 *Id.* at 395.

185 *Id.* at 396.

186 *People v. Philips*, (N.Y. Ct. Gen. Sess. June 14, 1813), reprinted in SAMPSON, *supra* note 31, at 9, and excerpts reprinted in MICHAEL MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 103 (2nd ed. 2006). More extensive excerpts are reprinted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955).

New York case in which the state sought to compel a Catholic priest to testify to what he learned in the confessional.<sup>187</sup> Mostly the prosecutor argued that New York's guarantee of freedom of worship did not excuse the performance of civic duties.<sup>188</sup> But he also said, in a single passing sentence, that "whenever any one shall claim to do what may justly offend the others, he claims an unequal, and so an unconstitutional 'preference.'"<sup>189</sup> There it is—the heart of the modern Establishment Clause argument in a single unelaborated phrase.

The argument did not succeed. The court interpreted the New York Constitution in a quite modern way that sounds much like the compelling interest test. The state constitutional exception, permitting regulation of religion in cases of "*licentiousness, of practices inconsistent with the tranquillity and safety of the state,*" "has reference to something actually, not negatively injurious. To acts committed, not to acts omitted—offences of a deep dye, and of an extensively injurious nature."<sup>190</sup> The court did not use the phrase "compelling government interest," but the idea is plainly similar. In the court's view, free exercise required regulatory exemptions, and the argument that the commitment to disestablishment might prohibit them did not deserve a response.

There is a similar holding, a good bit later than the other cases discussed, from a Virginia trial court in *Commonwealth v. Cronin*.<sup>191</sup> There the defendant, who had fatally beaten his wife, called her priest as a witness and asked if she had admitted to adultery in her final confession.<sup>192</sup> The court held, in a substantial opinion, that compelling the priest to testify would have the effect of suppressing a sacrament of the Catholic faith, and that constitutional guarantees of religious liberty clearly precluded such a result.<sup>193</sup> There is no reference to any Establishment Clause argument. But the prosecutor apparently did argue that exempting Catholic priests "would be extending to them a privilege not enjoyed by clergymen of the protestant persuasion."<sup>194</sup> There is no indication that this argument was rooted in the state's establishment clause; in any event, the argument of discrimination between two religions, based on the principle that all faiths must be treated equally, is very different from the modern

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187 McCONNELL ET AL., *supra* note 186, at 103–04.

188 *Id.* at 104–06.

189 *Id.* at 104.

190 *Id.* at 108 (emphasis added by court).

191 1 Q.L.J. 128 (Va. Cir. Ct. 1856).

192 *Id.* at 129.

193 *Id.* at 133–42.

194 *Id.* at 140.

argument that religious exemptions discriminate against activities that are in no sense religious.<sup>195</sup> The court found the argument “scarcely . . . necessary to notice;” Protestants had no practice analogous to Catholic confession, and when the law deprived Protestants of one of their sacraments, they too would be exempt.<sup>196</sup>

Finally, and also rather late in the day, there is the litigation that culminated in the Supreme Court’s decision in *Permoli v. Municipality No. 1*.<sup>197</sup> This was a challenge to a New Orleans ordinance prohibiting Catholic funerals except at a designated mortuary chapel. On its face, the ordinance was not generally applicable and thus did not really present an exemption issue. But the city argued that in effect it was generally applicable, because it was a health measure to prevent the spread of yellow fever,<sup>198</sup> and only Catholics held open-casket funerals.<sup>199</sup> The city argued that the ordinance was justified by “necessity,”<sup>200</sup> and that it did not violate Catholic conscience because the practice of holding funerals in the cathedral was merely a matter of “discipline,” not of “dogma.”<sup>201</sup> (This argument that the claimant does not understand his own religion, which appeared here and in *Commonwealth v. Wolf*,<sup>202</sup> is a remarkably common way of trying to duck the exemptions issue.) Finally, and decisively, the city argued that there was no federal issue, because the First Amendment did not apply to the states and because earlier federal guarantees of religious liberty in Louisiana (in legislation incorporating the Northwest Ordinance, implementing the treaty by which the territory was acquired from France, and authorizing citizens of the territory to form a state government) had lapsed when Louisiana became a state.<sup>203</sup> Once again, there is no hint of anything like an argument that exempting Catholics from a general policy would raise an issue of establishment.

It is hard to prove a negative. It is hard to prove that no one believed a proposition that was never advanced and thus drew no re-

195 The case of religion-like commitments with nontheistic foundations is explored *infra* in text at notes 246–52.

196 *Cronin*, 1 Q.L.J. at 140.

197 44 U.S. (3 How.) 589 (1845).

198 *See id.* at 600.

199 *See id.* at 601. It would not be learned until the early twentieth century that yellow fever is spread by mosquitos and not by dead bodies. *See* DAVID McCULLOUGH, *THE PATH BETWEEN THE SEAS* 142–45, 409–15, 421–23, 465–68 (1977) (tracing progress from the filth and dead-body theories of the nineteenth century to the elimination of yellow fever from the Panama Canal project in 1905).

200 *Id.*

201 *Id.* at 603.

202 3 Serg. & Rawle 48 (Pa. 1817); *see supra* notes 177–79 and accompanying text.

203 *Permoli*, 44 U.S. (3 How.) at 606–08.

buttals. But these legislative and judicial debates are obvious places where the Establishment Clause argument should have appeared if anyone believed it, or if anyone had even thought of it. Except for what amounts to a throw-away line in the prosecutor's argument in *People v. Philips*,<sup>204</sup> the New York confessional case, the argument simply does not appear. The argument appears to have been generally unimagined in the late-eighteenth and early-nineteenth centuries.

### C. *Other Scholarly Treatments of Founding-Era Debates*

The scholars who argue that regulatory exemptions are an establishment are not originalists.<sup>205</sup> There is a substantial originalist debate over whether regulatory exemptions are constitutionally *required*, in which historically-minded opponents of exemptions have argued that exemptions were not required by the original understanding. But none of those scholars has seriously argued that regulatory exemptions were *forbidden* by the original understanding, and none has cited a single instance of anyone in the founding generation arguing that regulatory exemptions were unconstitutional. Rather, their position is that exemptions were commonly granted but were thought to be a matter of legislative grace.

Ellis West acknowledges that "exemptions from conscription laws were often granted to religious conscientious objectors before, during, and after the Revolution;" he attributes this to legislative "sympathy."<sup>206</sup> Philip Hamburger argues: "[T]hat various state statutes (or even constitutions) expressly granted religious exemptions from military service and other specified civil obligations hardly suggests that such exemptions were rights under the United States Constitution."<sup>207</sup> Gerard Bradley makes an impassioned conceptual and originalist case against regulatory exemptions under the Free Exercise Clause, but insists that "[n]othing in this idea (and nothing in the Constitution) prohibits relief from neutral, generally applicable laws for conscientious objectors *by legislative accommodation*."<sup>208</sup>

The only historically-minded scholar who has in any way attempted to link regulatory exemptions to establishment is Philip Hamburger. In his most recent work, Hamburger concludes that religious exemptions do not generally violate the federal Establishment

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204 See *supra* notes 186–90 and accompanying text (discussing *Philips*).

205 See *supra* note 12.

206 West, *supra* note 43, at 375.

207 Hamburger, *supra* note 6, at 948.

208 Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 262 (1991).

Clause.<sup>209</sup> So perhaps his earlier work is best read as claiming only that some key participants in eighteenth-century debates argued or believed that exemptions were establishments. But even this claim would go far beyond his evidence.

Hamburger notes that religious dissenters attacking the privileges of the established church often argued for equal rights for all faiths.<sup>210</sup> Then he claims that this equal-rights argument “had implications for exemption,”<sup>211</sup> because exemptions “could create unequal civil rights.”<sup>212</sup> But this is Hamburger talking, not anyone from the eighteenth century. He has few examples of anyone attacking exemptions on these grounds—none that do so unambiguously and none that connect such an attack to an establishment of religion. Hamburger himself acknowledges elsewhere that proponents of religious liberty often clarified broad rhetoric about equal rights and opposition to laws taking cognizance of religion, insisting that government must also protect free exercise.<sup>213</sup> And just as legislators could grant exemptions and support them on policy grounds without believing they were constitutionally required—Hamburger’s principal point—so critics could oppose exemptions on policy grounds without believing they were constitutionally prohibited.

Hamburger’s effort to link exemptions with establishment gets no support from the few examples of eighteenth-century views in his footnotes. To show that Presbyterians might have opposed exemptions, he quotes a 1777 memorial of Virginia Presbyterians stating that “the concerns of religion, are beyond the limits of civil control,” and that accordingly, the church should not “receive any emoluments from any human establishments for the support of the gospel.”<sup>214</sup> Hamburger takes this quotation out of context; the *Memorial* was opposing the proposed general assessment, a tax for the support of Christian clergy of all denominations.<sup>215</sup> The entire *Memorial* is devoted to the “the propriety of a general assessment, or whether every religious society shall be left to voluntary contributions for the mainte-

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209 See Hamburger, *supra* note 87, at 1607 n.8 (“[T]he establishment clause permits at least some legislative exemptions.”).

210 Hamburger, *supra* note 6, at 946.

211 *Id.*

212 *Id.* at 947.

213 Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 343–45.

214 Hamburger, *supra* note 6, at 946 n.117 (quoting Memorial of the Presbytery of Hanover to the General Assembly of Virginia (Apr. 25, 1777) [hereinafter Memorial of Virginia Presbyterians], reprinted in WILLIAM ADDISON BLAKELY, AMERICAN STATE PAPERS 96, 98 (photo. reprint 2000) (1911)).

215 Memorial of Virginia Presbyterians, *supra* note 214, at 96–99.



nance of the ministers of the gospel who are of different persuasions.”<sup>216</sup> Indeed, the *Memorial* says that this issue is the only reason the *Memorial* was prepared.<sup>217</sup> The immediate context of Hamburger’s quotation is also about the assessment, as the sentences immediately preceding that quotation make clear:

Neither does the church of Christ stand in need of a general assessment for its support; and most certain we are that it would be of no advantage, but an injury to the society to which we belong; and as every good Christian believes that Christ has ordained a complete system of laws for the government of his kingdom, so we are persuaded that by his providence, he will support it to its final consummation. In the fixed belief of this principle, that the kingdom of Christ, and the concerns of religion, are beyond the limits of civil control, we should act a dishonest, inconsistent part, were we to receive any emoluments from any human establishments for the support of the gospel.<sup>218</sup>

“Emoluments” thus has its customary meaning of “[p]rofit or gain arising from station, office, or employment; dues; reward, remuneration, salary.”<sup>219</sup> The quotation is about money; it has nothing to do with regulatory exemptions.

“Emoluments” once had a second meaning, now long obsolete, of “advantage, benefit, comfort.”<sup>220</sup> The *Oxford English Dictionary* cites examples from 1633 to 1756, all suggesting physical comforts, not legal privileges.<sup>221</sup> We may see a lingering example of this usage in the other quotation Hamburger offers. He quotes the Baptist leader John Leland as the only pastor of the time to criticize the exemption of the *clergy* from taxation and military service.<sup>222</sup> Hamburger quotes the italicized portion of the following passage in Leland’s most famous sermon against establishments, *The Rights of Conscience Inalienable*<sup>223</sup>:

Ministers should share the same protection of the law that other men do, and no more. To proscribe them from seats of legislation,

216 *Id.* at 97.

217 *Id.* (“We would therefore have given our honorable Legislature no further trouble on this subject, but we are sorry to find that there yet remains a variety of opinions touching the propriety of a general assessment . . .”).

218 *Id.* at 98.

219 5 THE OXFORD ENGLISH DICTIONARY 182 (2d ed. 1989) (collecting examples from 1480 to 1881).

220 *Id.*

221 *Id.*

222 Hamburger, *supra* note 6, at 947 n.119.

223 John Leland, *The Rights of Conscience Inalienable* (1791), in 2 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 1079, 1083–99 (Ellis Sandoz ed., 2d ed. 1998).

*&c. is cruel. To indulge them with an exemption from taxes and bearing arms is a tempting emolument. The law should be silent about them; protect them as citizens (not as sacred officers) for the civil law knows no sacred religious officers.*<sup>224</sup>

“Emolument” here may refer to the financial benefit of tax exemption, the physical benefit of exemption from military service, or both. The important point is that these clergy exemptions were based on religious status, not on any religious belief that prevented compliance with the law. Few if any clergy conscientiously objected to taxes other than the tax for the established church, and few clergy outside the historic peace churches conscientiously objected to military service.<sup>225</sup> Yet all got the exemptions, simply because of their occupation.<sup>226</sup> As Justice O’Connor has explained, the fundamental distinction between status and belief helps reconcile regulatory exemptions with a strong principle of religious equality:

What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discriminations based on sect.<sup>227</sup>

This distinction was not developed in the eighteenth century, but something like it may have been implicit, reconciling the common rhetoric of equal rights with the common practice of exemptions for conscientious objectors. This implicit distinction could explain why the religious minorities that demanded equal rights for all faiths did not oppose regulatory exemptions on that ground, and why John Leland attacked privileges for the clergy as such on establishment-sounding grounds but made no such attack on conscientious objectors.

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<sup>224</sup> *Id.* at 1094 (emphasis added).

<sup>225</sup> The issue did not arise, because the clergy were exempt without regard to conscience. But in an era when denominational differences were much sharper than today, it would have been almost unimaginable for a pacifist clergyman to lead a nonpacifist church.

<sup>226</sup> See, e.g., An Act for Forming, Regulating, and Conducting the Military Force of This State, reprinted in CONNECTICUT LAWS, *supra* note 47, at 144, 144 (exempting “Ministers of the Gospel”); An Act To Regulate the Militia of the Commonwealth of Pennsylvania, ch. 750, § 2 (1777) (exempting “ministers of the gospel (or clergy)”), reprinted in 9 PA. STAT., *supra* note 41, at 75, 77 (1903). Despite the difficulty of answering Leland’s objection, clergy are still exempt from military service in the existing stand-by draft legislation. See 50 U.S.C. app. § 456(g) (2000).

<sup>227</sup> *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (O’Connor, J., concurring in part and concurring in judgment).

The very sermon Hamburger quotes illustrates the distinction between exemptions based on belief and exemptions based on status. Leland attacked the Connecticut tax for the support of the clergy as an establishment.<sup>228</sup> Protestant dissenters were exempt from paying this tax, and Leland also attacked that exemption.<sup>229</sup> But he did not attack the *exemption* as an establishment; he attacked it as not going far enough.<sup>230</sup> It presumed the power to tax,<sup>231</sup> it treated the exemption as an indulgence rather than a right,<sup>232</sup> and it required the dissenters claiming the exemption to submit certificates to examination by the justice of the peace, thus submitting a religious matter to civil authority.<sup>233</sup> He attacked the failure to exempt Jews, Catholics, Turks, and "heathens."<sup>234</sup> And he proposed that the consciences of both sides could be satisfied by reversing the burden of registering one's belief—by taxing all those who submitted their names as believing in the tax, and exempting all those who expressed their conscientious objection by doing nothing:

It is likely that one part of the people in Connecticut believe in conscience that gospel preachers should be supported by the force of law; and the other part believe that it is not in the province of civil law to interfere or any ways meddle with religious matters. How are both parties to be protected by law in their conscientious belief?

Very easily. Let all those whose consciences dictate that they ought to be taxed by law to maintain their preachers bring in their names to the society-clerk by a certain day, and then assess them all, according to their estates, to raise the sum stipulated in the contract [between each church and its pastor]; and all others go free. Both parties by this method would enjoy the full liberty of conscience without oppressing one another, the law use no force in matters of conscience, the evil of Rhode-Island [where contracts to pay the clergy were widely believed to be unenforceable] law be escaped, and no persons could find fault with it (in a political point of view) but those who fear the consciences of too many would lie dormant, and therefore wish to force them to pay.<sup>235</sup>

This is unambiguously a proposal for a tax with an exemption based on conscientious belief, although implemented in a way that maxi-

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228 Leland, *supra* note 223, at 1092–98.

229 *Id.* at 1092–95.

230 *Id.*

231 *Id.* at 1094.

232 *Id.*

233 *Id.* at 1094.

234 *Id.* at 1092.

235 *Id.* at 1097.

mizes both the liberty of the religious dissenters and the opportunity for false claims. Perhaps it was sarcastic, meant to illustrate the unworkability of any defensible scheme of taxation to support religion. But whether serious or sarcastic, neither this proposal nor Leland's undoubtedly serious attack on the narrowness of the then-existing exemption is consistent with a view that exemptions impermissibly establish the exempted religion.

Hamburger would dismiss the exemption from the church tax as irrelevant. He would distinguish exemption from a law that was religious in purpose and effect, from the perspective of majority and dissenters alike, from a law that—at least from the perspective of the majority—was wholly secular and religiously neutral.<sup>236</sup> It is true that Americans eventually rejected the tax for the established church as illegitimate. But for much of the eighteenth century, Americans in states with established churches viewed those taxes as wholly legitimate, and simultaneously enacted exemptions for religious dissenters.<sup>237</sup> These exemptions may have been the most attractive case, or the most easily understood, but it is anachronistic not to view them as genuine exemptions.

The exemption question was not near the center of Leland's concerns, because Baptists had no need of exemptions beyond exemption from the tax for the established church and exemption from laws licensing the clergy.<sup>238</sup> These laws could be repealed entirely—and eventually were. Leland apparently believed, consistent with a focus on laws such as these, that human affairs could be divided into a domain of conscience and a domain of civil society, with no overlap. In such a world, exemptions would not be needed to protect conscience, and should not be allowed from laws in the proper domain of civil society.<sup>239</sup> He did not define the two domains. In one sermon he said

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236 Hamburger, *supra* note 6, at 930–31.

237 See *supra* notes 60–62 and accompanying text.

238 See RALPH KETCHAM, JAMES MADISON 54–58 (1971) (describing James Madison's complaints about these laws shortly before the Revolution); ANSON PHELPS STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 369 (1950) (describing the effect on Baptists of Virginia's licensing laws); McConnell, *supra* note 16, at 2165–66 (same).

239 JACK NIPS [JOHN LELAND], THE YANKEE SPY 19 (Boston, John Asplund 1794).

It is often the case, that laws are made which prevent the liberty of conscience; and because men cannot stretch their consciences, like a nose of wax, these nonconformists are punished as vagrants that disturb the peace. The complaint is, "These men, being Jews, do exceedingly trouble the city." Let any man read the laws that were made about *Daniel* and the three children, and see who were the aggressors, the law makers or the law breakers. The rights of conscience should always be considered inalienable—religious opinions as not the objects of civil government, nor any ways under its juris-

that a person's conscience governs "all his actions,"<sup>240</sup> but in another he arguably equated conscience with worship.<sup>241</sup> Of course, even worship falls on the action side of the belief/action distinction; the three most recent free exercise cases in the Supreme Court all involved prohibited acts of worship.<sup>242</sup> We know that he opposed exemptions from laws on murder and battery,<sup>243</sup> but those are easy cases then and now. We do not know whether he thought that religious liberty for Quakers should include exemptions from serving in the military, taking oaths, or removing their hats in court.

Leland's statements about freedom of conscience, like many similar statements on both sides from the same era, are ultimately ambiguous on the difference between protecting only belief and worship, or protecting other religiously motivated conduct as well. So I do not claim that Leland affirmatively supported a right to religious exemptions from laws regulating conduct, even where the exempted conduct would do little or no harm to others. I do claim that there is not the slightest evidence that he opposed such exemptions as unconstitutional, and that his opposition to exemptions based on one's status as a clergyman, which may well have been grounded in his opposition to establishments, is no evidence of a similarly grounded opposition to exemptions based on conscience. Hamburger's quotations simply do not support his claim that eighteenth-century advocates of religious liberty thought that exemptions for conscience sake raised issues of establishment.

There were nearly four million Americans alive in the 1780s. Somewhere, sometime, someone might have said something condemning regulatory exemptions as an establishment—something more than a passing reference from a single prosecutor who lost his case a quarter century after ratification. Another such quote might

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diction; laws should only respect civil society; then if men are disturbers they ought to be punished.

*Id.*

<sup>240</sup> Leland, *supra* note 223, at 1085.

<sup>241</sup> LELAND, *supra* note 239, at 19 ("[W]hen a man is a peaceable subject of state, he should be protected in worshipping the Deity according to the dictates of his own conscience.").

<sup>242</sup> *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1216–18 (2006) (protecting consumption of *hoasca*, an herbal tea that contains a controlled substance, in a worship service); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524–25 (1993) (protecting sacrifice of animals in a worship service); *Employment Div. v. Smith*, 494 U.S. 872, 874–76 (1990) (refusing to protect consumption of peyote, a controlled substance, in a worship service).

<sup>243</sup> LELAND, *supra* note 239, at 18.

surface, or even more than one. But it is clear that such views were no significant part of the Founding-era debate on religious liberty.

#### IV. FROM ORIGINAL UNDERSTANDING TO THE PRESENT

This original understanding helps explain and confirm both American practice and Supreme Court precedent. From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions. James Ryan, using a Lexis search and sampling techniques, estimated that there were 2000 religious exemptions on state and federal statute books in 1992.<sup>244</sup> The idea that these exemptions may violate the Establishment Clause is of modern origin, perhaps first seriously suggested by Philip Kurland in 1962.<sup>245</sup>

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244 James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 & n.215 (1992). His search method appears to have included tax exemptions as well as regulatory exemptions.

245 See KURLAND, *supra* note 12, at 17–18, 40–41, 111–12. The argument also appears in highly conclusory fashion—in a single phrase—in the unsuccessful argument of the prosecutor in *People v. Philips* (N.Y. Ct. Gen. Sess. June 14, 1813). See *supra* note 189 and accompanying text.

A related, but different argument appeared in the World War I draft cases. In World War I, the exemption from military service was limited to members “of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbids its members to participate in war in any form” and who personally shared that tenet of the organization’s creed. Selective Draft Act of 1917, ch. 15, § 4, 40 Stat. 76, 78. The famous anarchist Emma Goldman, prosecuted for giving speeches and distributing literature that allegedly induced men not to register for the draft, argued that this exemption provision discriminated on the basis of denomination and established the preferred denominations. Brief on Behalf of the Plaintiffs in Error at 33–40, *Goldman v. United States*, 245 U.S. 474 (1918) (No. 702). An amicus brief argued that the provision denied free exercise of religion to conscientious objectors in unexempted denominations or with nontheistic moral commitments. Brief of Walter Nelles, *Ruthenberg v. United States*, 245 U.S. 480 (1918) (No. 656). These arguments would have to be taken quite seriously today under cases rigorously enforcing the constitutional ban on denominational discrimination. See *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 702–05 (1994) (invalidating statute that relieved burden on one religious group with no mechanism to assure similar relief to any other religious group similarly situated); see also *Welsh v. United States*, 398 U.S. 333, 335–44 (1970) (plurality opinion) (construing statutory exemption from military service to include nontheistic objectors); *United States v. Seeger*, 380 U.S. 163, 173–85 (1965) (same). But in 1918, the Court summarily rejected both the establishment and free exercise arguments as unworthy of discussion. *Goldman*, 245 U.S. at 476; *Selective Draft Law Cases*, 245 U.S. 366, 389–90 (1918). For brief accounts of Emma Goldman and the *Selective Draft Law Cases*, see DAVID M. RABAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 65–67, 270–71 (1997).

Justice Harlan adopted a version of the argument in his concurring opinion in *Welsh v. United States*.<sup>246</sup> He would have permitted Congress to exempt men with deeply held conscientious objection to military service, but he would not have permitted Congress to exempt objectors who based their moral objection on some form of traditional religion without also exempting those who based their equally deep moral objection on some form of secular philosophy.<sup>247</sup> But where Congress attempted to exempt only the former, his remedy would have been to extend the exemption to include the latter as well.<sup>248</sup>

I have no fundamental quarrel with Harlan's position on this issue, although I would prefer a different explanation for his result. I have long urged that given the current distribution of religious opinion, exemptions should extend to the deep-seated moral objections of those who reject traditional religious teachings.<sup>249</sup> This result is most easily reached by taking a broadly inclusive view of what counts as religion, including both affirmative and negative answers to the great religious questions—essentially by the plurality's route in *Welsh*<sup>250</sup> rather than by Justice Harlan's, although either route will suffice. Persons with sufficiently deep moral objections to a law are similarly situated with traditional religious objectors; persons with other kinds of objections to a law are not.

My disagreement is with those who would interpret religion narrowly and traditionally, and who would also reject Harlan's remedy for too-narrow exemption laws, and who would then invalidate religious exemptions as discriminatory. Judges and others who combine these three positions would deny religious liberty to the overwhelming majority of conscientious objectors because of such judges' own refusal to protect the small minority of equally conscientious objectors whose objection is based on a belief that doesn't seem to fit traditional or conventional understandings of religion.<sup>251</sup> The best solution is to exempt all conscientious objectors (always subject to the compelling in-

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246 398 U.S. at 356–67 (Harlan, J., concurring).

247 See *id.* at 356–61.

248 See *id.* at 361–67.

249 See Laycock, *supra* note 13, at 1002; Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 326–37 (1996).

250 *Welsh*, 398 U.S. at 335–44 (plurality opinion) (concluding, despite restrictive statutory language, that Welsh's deeply held moral convictions were religious). To similar effect, see *Seeger*, 380 U.S. at 173–85 (treating as religious those beliefs that occupy, in the life of a nontheist, a place parallel to that occupied by God in the life of a traditional believer).

251 See Laycock, *supra* note 249, at 336–37.

terest exception), whether religious or nonreligious by traditional theistic conceptions. The second-best solution is to protect at least the great majority of conscientious objectors who are traditionally religious; this “majority” is a diffuse and disparate majority of a generally small minority holding deep moral objections to laws with majority support. The worst outcome is to deny protection to all conscientious objectors because legislators and judges find it difficult to explicitly extend protection to a small number of the hardest cases.

Some readers may find this a surprise ending. What is the difference between my saying that the right to religious exemptions should be extended to nontheists with deep-seated moral objections, and others saying that exemptions exclusively for religious believers violate the Establishment Clause? Both positions have some basis in the principle of neutrality between different religious beliefs. But they differ in two important ways. The Establishment Clause argument, at least as it has been presented in recent litigation, tends to take a much broader view of who is discriminated against. Some proponents of the Establishment Clause argument—not all—appear to believe that an exemption for Sabbath observers establishes religion because there is no exemption for football fans or for parents having trouble finding child care. But I would extend exemptions only to persons whose claim is sufficiently analogous to what all would agree is a religion. In the absence of a theistic belief or a nontheistic organization or tradition that is functioning like a religion (such as Buddhism), that analogy can be made out only by a deep-seated moral commitment—not by just any other highly desired Saturday activity.

More fundamentally, the opponents of exemptions let the principle of formal neutrality toward religion swallow a second principle practiced at the founding: that legislators could exempt religious objectors from regulation. The problem of the secular conscientious objector did not exist in the Founders’ time. Now that such objectors exist, the solution is to extend the exemption principle to include them, not to repeal the exemption principle because the neutrality principle has become more difficult to implement. I have made the normative argument for regulatory exemptions elsewhere and will not repeat it here.<sup>252</sup> But the claim that the emergence of a significant secular minority makes it unconstitutional for legislatures to exempt religious practices from regulation would turn the Religion Clauses on their head, treating increased opposition to religious belief and believers as in itself a reason that requires government to restrict legis-

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<sup>252</sup> See, e.g., *id.* at 316–26, 347–48; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 10–68.



lative protection for the religious liberty of those believers—when increased opposition to a group should more properly be a reason for vigilance in protecting the liberties of that group.

### CONCLUSION

The Supreme Court is deeply divided on the question of whether regulatory exemptions are sometimes constitutionally required.<sup>253</sup> But since the retirement of Justice Harlan, the Court has repeatedly been unanimous in support of the general view that regulatory exemptions are constitutionally permitted.<sup>254</sup> The Court first seriously addressed the issue in *Corp. of the Presiding Bishop v. Amos*,<sup>255</sup> unanimously upholding a provision exempting religious organizations from a federal prohibition on religious discrimination in employment.<sup>256</sup> The most recent example is *Cutter v. Wilkinson*,<sup>257</sup> unanimously rejecting Establishment Clause challenges to the prison provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>258</sup>

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253 Compare *City of Boerne v. Flores*, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring), with *id.* at 544–65 (O'Connor, J., dissenting).

254 See *Cutter v. Wilkinson*, 544 U.S. 709, 719–26 (2005); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 705–06 (1994); *id.* at 711–12 (Stevens, J., concurring); *id.* at 715–16 (O'Connor, J., concurring); *id.* at 722–24 (Kennedy, J., concurring in the judgment); *id.* at 743–45 (Scalia, J., dissenting); *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *id.* at 893–97 (O'Connor, J., concurring); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334–39 (1987); *id.* at 340–46 (Brennan, J., concurring); *id.* at 346 (Blackmun, J., concurring); *id.* at 348–49 (O'Connor, J., concurring). But see *Boerne*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring) (arguing, without mention of his opinion in *Grumet* or the opinions he joined in *Amos* and *Smith*, that the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1 (2000), establishes religion by preferring churches to art galleries).

255 483 U.S. 327.

256 See *id.* at 334 (“This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.” (quoting *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144–45 (1987))); *id.* at 345 (Brennan, J., concurring) (arguing that “substantial potential for chilling religious activity . . . justifies a categorical exemption for nonprofit activities” of religious organizations); *id.* at 346 (Blackmun, J., concurring) (upholding the exemption “[e]ssentially for the reasons” stated by Justice O’Connor); *id.* at 349 (O’Connor, J., concurring) (“[T]he objective observer should perceive the Government [exemption] as an accommodation of the exercise of religion rather than as a Government endorsement of religion.”).

257 544 U.S. 709 (2005).

258 See *id.* at 719–26 (holding that RLUIPA § 3, 42 U.S.C. § 2000cc-1 (2000), appropriately lifts burdens on the free exercise of religion without unduly burdening others and without discriminating among faiths).

Of course there are limits to this rule. Regulatory exemptions are invalid if they are “absolute” and “take[ ] no account” of burdens on others in particular applications,<sup>259</sup> or if they are confined to a single sect,<sup>260</sup> or to a single religious practice in a context where other religious practices are equally relevant to the exemption.<sup>261</sup> The Court invalidated a tax exemption because in the plurality’s view there was no burden on religious exercise to be relieved and the cost of the exemption burdened other taxpayers,<sup>262</sup> or because, in the more convincing view of a concurring opinion, the exemption created a content-discriminatory tax on the press.<sup>263</sup> But nothing in these cases supports any version of the claim that regulatory exemptions are facially, generally, or usually invalid. To the contrary, in two of these cases limiting the reach of exemptions, large majorities made a point of reaffirming the constitutionality of legislation exempting religious practices from burdensome regulation—eight justices in *Texas Monthly v. Bullock*<sup>264</sup> and nine justices in *Board of Education v. Grumet*<sup>265</sup> (perhaps more commonly known as *Kiryas Joel*). Every Justice said it again in *Employment Division v. Smith*,<sup>266</sup> the case that limited free exercise claims to exemptions. And as already noted,<sup>267</sup> they unanimously so held in *Amos* and *Cutter*.

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259 *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985).

260 *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 702–05 (1994).

261 *See Thornton*, 472 U.S. at 711–12 (O’Connor, J., concurring).

262 *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18–19 & n.8 (1989) (plurality opinion).

263 *Id.* at 25–26 (White, J., concurring); *see id.* at 27–28 (Blackmun, J., concurring).

264 *See id.* at 18 n.8 (plurality opinion) (approving *Amos*); *id.* at 28 (Blackmun, J., concurring) (approving *Amos*); *id.* at 38–40 (Scalia, J., dissenting) (arguing that regulatory and tax exemptions are generally permitted and sometimes required). Justice White’s brief concurrence said nothing about the exemption issue one way or the other. *See id.* at 25–26 (White, J., concurring).

265 *See* 512 U.S. at 705 (stating that “the Constitution allows the state to accommodate religious needs by alleviating special burdens;” reaffirming *Amos*); *id.* at 711–12 (Stevens, J., concurring) (distinguishing the facts of *Grumet* from “a decision to grant an exemption from a burdensome general rule”); *id.* at 716 (O’Connor, J., concurring) (“The Constitution permits ‘nondiscriminatory’ religious-practice exemption[s]” (quoting *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (emphasis by Justice O’Connor))); *id.* at 723–24 (Kennedy, J., concurring) (approving *Amos* and similar cases); *id.* at 744 (Scalia, J., dissenting) (“The Court has . . . long acknowledged the permissibility of legislative accommodation.”).

266 *See* 494 U.S. at 890 (“a nondiscriminatory religious-practice exemption is permitted”); *id.* at 893–97 (O’Connor, J., concurring) (arguing that regulatory exemptions for religious exercise are constitutionally required).

267 *See supra* notes 255–58 and accompanying text.

The argument that regulatory exemptions implicate the Establishment Clause is relatively new. It grows from misapplication of attempts to summarize the principles of disestablishment and free exercise in the broad language of neutrality. But if ripped from context and historical roots, such broad language can suggest results inconsistent with those underlying principles.

As understood by those in the founding generation who labored in the states on behalf of disestablishment, there was a material difference between support for organized religion (establishment, and a threat to religious liberty) and exemption for religious practice (liberty enhancing, whether or not required by free exercise). Exemptions are not a way of expanding the power of the dominant religion; they are a way of protecting religions that lack the political power to prevent legislation that imposes substantial burdens on their religious practice. Government support makes a religion better off than it would have been if government had done nothing; regulatory exemptions relieve burdens imposed by government and leave the religion's adherents no better off than if government had not imposed the burden in the first place. Government does not establish a religion by leaving it alone. And there is no evidence the Founders thought otherwise.