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Liberty of the Exercise of Religion in the Peace of Westphalia

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I. INTRODUCTION

This essay honors my dear friend of half a century, Burns Weston. In it, I take a fresh look at the backdrop and structure of toleration and religious freedom in the Peace of Westphalia of 1648 and in the American Constitution, with special focus on a recent unanimous Supreme Court decision of first impression. That important decision protects inner church freedoms in ecclesiastical employment, the so-called "ministerial exception" to federal and state employment discrimination laws.[1]

"Of all the great world religions past and present," writes the noted historian Perez Zagorin, "Christianity has been by far the most intolerant."[2] Violence and the wars of religion before and after the Protestant Reformation and Catholic Counter-Reformation, in particular, exhausted Europe. The Peace of Westphalia ended the brutal Thirty Years' War in Europe (Spain and France remained at war until the Treaty of the Pyrenees of 1659). Europeans and Americans often congratulate themselves on the rise of religious toleration afterwards.[3] This story may be flawed, for sectarian violence actually increased inside states from 1550 to 1750.[4]

The Peace of Westphalia applied basic terms of an earlier religious agreement, the Peace of Augsburg of 1555, to all the major European powers:

> As before, the religion of the ruler was to be the established religion of the territory. Within each territory, however, the non-established religious confessions whether Protestant or Roman Catholic, were given the right to assemble and worship as well as the right to educate their children in their own faith. Thus a principle of religious toleration was established between Lutherans, Calvinists, and Roman Catholics . . . [and] the principle of royal supremacy over both church and state . . . was reaffirmed but with certain limitations for the benefit of non-established churches. At the same time, the new constitutional principle of limited religious toleration be-

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[1] Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, No. 10–553 (Jan. 11, 2012), *available at* http://www.supremecourt.gov/opinions/11pdf/10-553.pdf.

[2] PEREZ ZAGORIN, HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST 1 (2003).

[3] BENJAMIN J. KAPLAN, DIVIDED BY FAITH: RELIGIOUS CONFLICT AND THE PRACTICE OF TOLERATION IN EARLY MODERN EUROPE 2–7 (2007). Kaplan suggests "the possibility of other options." *Id.* at 358.

[4] *Id.* at 336–43.

> came a foundation of a new concept of international law based on state sovereignty.[5]

My essay focuses on the historical background and structure for this new international order with its little-understood provisions for religious toleration and freedom. The Westphalian system of sovereign states spread widely after ending the Christian wars in Europe, beginning with the American Declaration of Independence. I ask whether there is any link between provisions for free exercise of religion in the Treaty and the Religion Clauses of the American Constitution and compare them structurally. The roots of religious tolerance worked out in the structure and practice of the Peace of Westphalia might have special relevance within the global community today, when ubiquitous tensions between liberty of conscience, secular ideology, and religion are faced by most sovereign states, certainly in the United States.

II. *HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL V. EEOC*

In early 2012, a unanimous U.S. Supreme Court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[6] It is a narrow decision, but one that takes us squarely into old struggles between church and state: who defines and appoints the clergy and who governs the church?

For the first time, the Supreme Court recognized a "ministerial exception" to bar a lawsuit brought against a church by a teacher under neutral federal and state employment discrimination statutes of general applicability. Her church claimed exemption from suit because some of her work qualified as ministerial. The Court agreed. The church's religious freedom included hiring people to serve its mission, and she qualified as a minister. "The church must be free to choose those who will guide it on its way."[7]

Chief Justice Roberts' opinion traces the historical development of the Constitution's Religion Clauses and their importance to the new nation adopting them: "the Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own," he writes.[8] The opinion thus seeks to reconcile a tension he notes between the Establishment and the Free Exercise Clauses. One way to describe this tension is: an exemption created by courts or by law to an otherwise valid neutral law of general applicability that incidentally burdens the free exercise of religion is

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[5] HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 61–62 (2003) [hereinafter BERMAN, LAW AND REVOLUTION II].

[6] *Hosanna-Tabor*, No. 10–553.

[7] *Id.* at 22.

[8] *Id.* at 9.

state action that, in effect, creates an establishment of religion by preferential treatment. There is a vast literature on every aspect of this tension, made even more anomalous by the incorporation of both Religion Clauses as against the states through the Fourteenth Amendment. Commentators have long considered religious clause jurisprudence, especially the jurisprudence of the Establishment Clause, to be in a complete muddle.[9]

The narrow but unanimous opinion signals a remarkable attempt to unify the two clauses, referring to them throughout as the "Religion Clauses," which the Court has often done previously for convenience. Chief Justice Roberts uses the phrase to identify a kind of separate sphere or category of church freedom from state interference with ecclesiastical appointments and internal governing practices. This kind of autonomy of church ecclesiastical power is not new. Before the Papal Revolution of the 11th Century, the feudal Christian kings made many ecclesiastical appointments as part of administering their feudal fiefs that scarcely distinguished secular from religious power.[10] In *The King's Two Bodies*, Ernst Kantorowicz explains:

> What matters here is only the *persona mixta* in the religio-political sphere where it was represented chiefly by bishop and king, and where the "mixture" referred to the blending of spiritual and secular powers and capacities united in one person. Dual capacity in this sense was a feature customary and rather common with the clergy during the feudal age when bishops were not only princes of the Church but also feudatories of kings.[11]

As discussed below, Pope Gregory VII considered these ecclesiastical appointments as outside a king's temporal powers. The reforms included a new corporate, hierarchical structure that asserted papal sovereignty over matters "spiritual" and included appointments of clergy and investitures of kings.[12] This Papal Revolution purified the Church, enforcing spiritual jurisdiction by canon law found in Gratian's decretals from the newly discovered Corpus Juris Civilis of Justinian in Bologna.[13]

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[9] Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMENDMENT L. REV. 1, 4 (2006) ("[C]onstitutional scholars of every stripe seem to agree . . . that the Court's Establishment Clause jurisprudence is an incoherent mess.").

[10] JOSEPH R. STRAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE 20–21 (1973) (noting that kings "appointed abbots, bishops, and often popes; they even intervened (as Charlemagne had) in matters of doctrine").

[11] ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY 43 (1997).

[12] NORMAN F. CANTOR, THE CIVILIZATION OF THE MIDDLE AGES 260 (1993).

[13] STRAYER, *supra* note 10, at 21–22. *See generally* HAROLD J. BERMAN, LAW AND REVOLUTION:

The Protestant Reformation reversed papal hierarchical control over the secular power, clawing back much spiritual authority to the jurisdiction of secular rulers.[14] Harold Berman explains:

> [P]rotestantism transferred spiritual authority and spiritual responsibilities to the secular lawmakers of the various principalities and nation-states, whose supreme authorities now embraced all the jurisdictions that had previously been autonomous. Secular law may thus be said to have been spiritualized at the same time that it became nationalized . . . . [S]ecularism itself became secularized and the common legal heritage of the West dissolved into intense nationalisms.[15]

The Roberts opinion does not go into the Papal Revolution, relying mainly on early historical precedents from England: one from the Magna Carta of 1215, in which King John promises free election of clergy of the English Church; and another for freedom of the Anglican Church under King Henry VIII.[16] The first recognizes the feudal tension with papal authority over internal church affairs. The second flows from the Protestant Reformation, where the English king also took back ecclesiastical matters as head of the Anglican Church and appointed or dismissed ministers previously appointed or controlled by Rome. There would be no ministerial exceptions under Henry VIII. He did not tolerate churches that appointed Catholic priests or Calvinist ministers in his realm outside his authority as head of the Anglican Church. Catholics, Puritans, and other Protestants in England were coerced either to follow the doctrines and practices of the Anglican Church or to leave the country. Some left and ended up in Holland or America. English toleration of dissident religions took bloody civil wars to work through.

Before the American Revolution, some colonies were required to follow the established religion of the English king. After the Revolution, the newly independent American states could establish or disestablish religion on their own, as Madison's Memorial and Remonstrance demonstrates, with popular sovereignty now posing a different problem in tolerating minority religions. In the new Constitution, however, the federal government was disabled from establishing a national religion or prohibiting the free exercise thereof. The

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THE FORMATION OF THE WESTERN LEGAL TRADITION (1983) [hereinafter BERMAN, LAW AND REVOLUTION]; DIARMAID MACCULLOCH, CHRISTIANITY: THE FIRST THREE THOUSAND YEARS 377 (2009).

[14] BERMAN, LAW AND REVOLUTION II, *supra* note 5, at 61–62.

[15] *Id.* at ix–x.

[16] "The Act of Supremacy of 1534, 26 Hen. 8, ch. 1, made the English monarch the supreme head of the Church, and the Act in Restraint of Annates, 25 Hen. 8, ch. 20, passed that same year, gave him the authority to appoint the Church's high officials." Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, No. 10–553, slip op. at 7 (Jan. 11, 2012); *see also* ZAGORIN, *supra* note 2, at 188–239.

two Religion Clauses of the First Amendment further disabled the national government from interfering with any state religious establishment, though this is controversial.

The framers of the American Constitution wanted to protect the liberty of conscience by prohibiting laws imposing a national religion by coercion or taxation. Interestingly enough, the phrases guaranteeing "the free Exercise of their Religion" and "the Liberty of the Exercise of Religion" appear in the Treaty of Münster (one of the two Westphalian treaties) a century and a half before they show up in the First Amendment. We do not know if there is any connection.

Chief Justice Roberts applied the two Religion Clauses of the First Amendment as defenses to suits under both federal and state employment law, the latter presumably through the Fourteenth Amendment. He never mentioned incorporation—except implicitly—by relying on Supreme Court cases from the mid-20th Century that prohibit states from interfering with the freedom of religious groups to decide disputes over ownership of church property through their internal process: "[I]t is impermissible for the government to contradict a church's determination of who can act as its ministers."[17] The famous *Kedroff* case in 1952 protected the Russian Orthodox Church's highest ecclesiastical authority from a New York law's interference with its decision on which congregation would have use of the Saint Nicholas Cathedral.[18] With *Hosanna-Tabor*, the Court for the first time extended that inner church freedom to appointing ministers as well.

The result is a unified doctrine at all levels of government without any attempt at explaining anomalies of incorporating the Establishment Clause that have been pointed out by many scholars, such as Akhil Amar[19] and Michael McConnell.[20] In effect, the Court constructs a single category or new sphere of church immunity to insulate ecclesiastical governance, appointments, and perhaps internal employment from government social employment policy or non-discrimination laws at every level.[21] In structure, the result restores part of the exclusive church control of ecclesiastical appoint-

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[17] *Hosanna-Tabor*, No. 10–553, slip op. at 10.

[18] Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

[19] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 34 (1998).

[20] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1417 (1990).

[21] *See* Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

ments and inner governance, which the medieval church took away from the Christian feudal kings in the 12th Century.[22]

The Chief Justice does not delve into the wars of religion that led to increased religious freedom for individuals and churches after the Protestant Reformation. When the former English colonies declared their sovereign independence in 1776, however, they did so within an international framework of the new Westphalian system of sovereign territorial nation-states with provisions for free exercise of religion by dissidents in the territory of an established state religion.

III. CHRISTIAN INTOLERANCE: ROME TO THE BREAK-UP OF CHRISTENDOM

I would now like to step back for a broad review of religious intolerance in church and state relations from ancient Rome to Christendom's wars of religion after its break-up in the Protestant Reformation of early modern Europe. We need this review to explain a paradox. How could religious freedom and toleration emerge from the Peace of Westphalia of 1648, which removed the Christian religion from political power of a sovereign state, while at the same time allowing establishment of a Christian church as the state religion?

A. Intolerance and Coercion in Christian Rome

"Should we tolerate the intolerant?"[23] Religious sects in countries like France or the United States cannot practice intolerance to harass or persecute deviants or heretics in their midst, but "they are free to excommunicate or ostracize" them and

> equally free to believe and say that such people will be damned forever or denied a place in the world to come—or that any other group of their fellow citizens are living a life that God rejects or that is utterly incompatible with human flourishing. Indeed, many of the Protestant sectarians for whom the modern regime of toleration was first designed, and who made it work, believed and said just such things.[24]

The problem, according to Michael Walzer, is that "within the idea of religious toleration itself, virtually all the tolerated religions aim to restrict in-

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[22] *See* Steven D. Smith, *Freedom of Religion or Freedom of the Church?* (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Working Paper No. 11-061, 2011), *available at* http://ssrn.com/abstract=1911412; BERMAN, LAW AND REVOLUTION II, *supra* note 5, at 50–51, 103–06.

[23] MICHAEL WALZER, ON TOLERATION 80 (1997) (explaining that tolerance is attitude and toleration is practice).

[24] *Id.* at 81.

dividual freedom . . . . Most religions are organized to control behavior."[25] In the United States, people are prepared to tolerate minority religions and, thus, defend religious liberty, but many

> have no tolerance for personal liberty outside the house of worship. If sectarian communities aim to control the behavior of their own people, the more extreme members of religious majorities aim to control everyone's behavior—in the name of a supposedly common (Judeo-Christian, say) tradition, of "family values," or of their own certainties about what is right and wrong.[26]

And they do not hesitate to ask the state for help. To refuse this help, they claim, denies them the right of the free exercise of their own religion.[27]

Original Christianity, initially the victim of religious intolerance and persecution, preached and practiced unilateral human love, but would not tolerate Roman paganism.[28] After Constantine converted to Christianity and legalized it, the final merger of Rome and Christianity under Theodosius made punishment possible for both heresy and blasphemy. First, the Church would anathematize the offenders. They were then turned over to the Roman state for punishment, forfeiting property and civil rights[29] and sometimes life itself. The powerful Augustine, bishop of Hippo, advocated systematic persecution of heretics, leading the way to the "medieval mentality and to the Inquisition," which continued and refined the practice.[30]

Augustine waged "long theological combat with three formidable heresies, Manichaeanism, Pelagianism, and Donatism."[31] He justified coercion against heretics to enforce religious truth, especially against the Donatists, who viewed Christianity's alliance with Rome "as a renunciation of Christ in favor of Caesar."[32] Church theology fused the empire to an expanding neo-Platonic

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[25] *Id.* at 71.

[26] *Id.* at 70.

[27] *See infra* note 170 (discussing Catholic bishops claiming exemption from a general health insurance regulation for employees requiring birth control benefits). For contemporary discussion, see Timothy Egan, *Theocracy and Its Discontents*, N.Y. TIMES, Feb. 23, 2012, http://opinionator.blogs.nytimes.com/2012/02/23/theocracy-and-its-discontents/?ref=opinion.

[28] CARLTON J. H. HAYES, 1 A POLITICAL AND CULTURAL HISTORY OF MODERN EUROPE 197 (rev. ed. 1932).

[29] LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 44–57 (1993) [hereinafter LEVY, BLASPHEMY].

[30] *Id.* at 46.

[31] ZAGORIN, *supra* note 2, at 26.

[32] *Id.* at 27.

human society in the body of Christ, unified by ritual and Truth.[33] Because it took both church and state to put down heresies,[34] the one "true" Catholic religion, when mixed with coercive state power, would not so easily separate. Augustine's discovery of "self" and conscience, as Peter Brown suggests, also allowed the use of fear of coercion to suppress heresy.[35]

Sometime after Rome's fall,[36] the prophet Mohammed brought forth a new religion challenging the divinity of Jesus. The Christian Eastern Empire checked the invasion of Islam into Europe from the east. Moving across North Africa, Islamic armies crossed Iberia and entered into what is now France from the west around the northern Pyrenees. The Frankish king, Charles Martel, stopped the Muslims at the Battle of Poitier. What remained of the Western Empire now had time to negotiate with the barbaric Germanic chieftains. According to historian Judith Herrin, the resulting bargains prompted Martel and others to assimilate Christianity.[37] The rise of feudalism under Christian kings and Western Emperor Charlemagne eased the formation of Christendom, a polity that allowed neither Church nor feudal kings to dominate entirely.[38] This contrasted with singular imperial dominance in the Christian East and in Islam. Herrin's scholarship places an aggressive Islam near the center of the question of why the separation of church and state arose in the West from these bargains, but not in Byzantium nor in Arab, Ottoman, or Persian Islam.[39]

B. The Papal Revolution

Tension between Christian kings and the Church over ecclesiastical matters prevented universal political union of Western Christendom, unlike in the East. Many Christian kings took upon themselves sacred missions, as in

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[33] *See* PETER BROWN, AUGUSTINE OF HIPPO: A BIOGRAPHY 213–21 (rev. ed. 2000).

[34] CHARLES FREEMAN, THE CLOSING OF THE WESTERN MIND: THE RISE OF FAITH AND THE FALL OF REASON 308–09 (2005) (stating that the diversity of sources of Christian doctrine made any kind of coherent "truth" difficult to sustain, and only the emperors could maintain order).

[35] BROWN, *supra* note 33, at 503.

[36] The fall of Rome was abrupt and sometimes blamed on Christianity and monasticism, although the economic well-being of its taxpayers and economic conditions surrounding the Germanic invasions are the more cited causes today. BRYAN WARD-PERKINS, THE FALL OF ROME AND THE END OF CIVILIZATION 40–41 (2005). "The Roman state has been reduced to a miserable condition . . . and throughout the world the unspeakable heresy of the Arians, that has become so embedded amongst the barbarian peoples, displaces the name of the Catholic church." *Id.* at 31 (quoting a Chronicler of 452 before the formal end of Rome came in 476).

[37] *See* JUDITH HERRIN, THE FORMATION OF CHRISTENDOM 303–06 (1987).

[38] *Id.* at 356–60, 454–57, 480.

[39] *Id.* at 479–80.

the Crusades, and controlled bishops and local clergy with grants of land in exchange for feudal allegiance. The reforms of Pope Gregory VII, beginning in the 11th Century, removed ecclesiastical appointments of Church hierarchy from the kings to the pope as head of a divine hierarchy, the sole Vicar of Christ, patterned after Roman hierarchy.[40] These reforms enforced Christian purity by reclaiming spiritual matters from the secular world, taking back power to appoint bishops, insisting upon celibacy among the priests and clergy (whose worldly marriages profaned the faith), and asserting the right of investiture of kings.[41] Historian Norman Cantor refers to these reforms as the Gregorian World Revolution.[42]

All Christian rulers were now subject to the spiritual authority of the pope, backed by his power of excommunication.[43] Radical purification and control required the development and written codification of a separate canon law, drawn from the Roman civil codes, whose importance to the Western legal tradition has been under-appreciated. This separation of spheres of jurisdiction between spiritual domination by the pope and temporal domain of the kings introduced a check on arbitrary state power from principles of Catholic natural law.[44] Moreover, canon law controlled matters such as marriage, inheritance, heresy, and blasphemy.[45] Most people held the belief that political unity required religious unity.[46] Disruptions in Christian unity were handled at the most local level possible under canon law and medieval practices of subsidiarity.[47] There were many violent popular rebellions against authorities as a result of the Papal Revolution. The political agenda of the

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[40] CANTOR, *supra* note 12, at 258.

[41] BERMAN, LAW AND REVOLUTION, *supra* note 13, at 85–119; CANTOR, *supra* note 12, at 258–76 (claiming papal power to depose emperors and kings and creating a new world order for Christian society "founded on the principle that papal authority alone was universal and plenary, while all other powers in the world, whether emperors, kings or bishops, were particular and dependent").

[42] CANTOR, *supra* note 12, at 243–76.

[43] Ambrose used the threat of excommunication to subjugate the emperor Theodosius in the 4th Century in the assault on paganism when the Nicene creed was adopted as the only truth: "This supremacy was embedded in western theology in the works of Augustine and Thomas Aquinas and . . . was used for the excommunication of the Holy Roman emperor Henry IV by pope Gregory VII in the 1070s." CHARLES FREEMAN, A NEW HISTORY OF EARLY CHRISTIANITY 259 (2009).

[44] See BERMAN, LAW AND REVOLUTION, *supra* note 13, at 44–45, 85–86.

[45] *Id.*

[46] HAYES, *supra* note 28, at 201.

[47] Paola G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003) (tracing the subsidiary principle from medieval thought into the Reformation and today's secular human rights dilemmas of intervention and resolution).

papal party called for "the freedom of the church" or liberating "the clergy from imperial, royal, and feudal domination and their unification under papal authority."[48]

C. Heresies and Treason in Medieval Christianity

The religious wars that disturbed the general security of all in Western Europe after the Protestant Reformation did not just spring from Martin Luther's schism or Henry VIII's revolt from papal authority and the Puritan Revolution in England. They had taken a long time coming.[49] Heresies in Christendom, magnified by devastating plagues, accumulated gradually from Abelard of the 11th Century, William of Ockham's nominalism,[50] reintroduction of science from Aristotle's work, the medieval idea of the individual conscience, peasants' revolts against authority, subversive art, and finally Luther's protests against selling indulgences in the 16th Century as "works" to earn salvation (such as raising money to rebuild St. Peter's Basilica in Rome).[51] The Spanish monarchs undertook a concerted effort of expelling Jews from Spain (later Muslims) to centralize their rule, using the Spanish Inquisition, which adopted the most exquisite methods of torture, in their service.

In 1518, friends of Luther translated his 95 Theses from Latin into German. They were printed and widely circulated. The protest was one of the first in history to be aided by the printing press, and copies quickly spread throughout Germany and the rest of Europe. Pope Leo X excommunicated Luther on January 3, 1521, for heresy. Placed under jurisdiction of the secular power for enforcement at the Diet of Worms, Luther stood his ground, refusing to go against his own religious conscience under threat of coercion:

> Unless I am convinced by the testimony of the Scriptures or by clear reason (for I do not trust either in the pope or in councils alone, since it is well known that they have often erred and contradicted themselves), I am bound by the Scriptures I have quoted and my conscience is captive to the Word of God. I cannot and will not recant anything, since it is neither safe nor right to go against conscience. May God help me. Amen.[52]

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[48] BERMAN, LAW AND REVOLUTION, *supra* note 13, at 103–04.

[49] *See* CANTOR *supra* note 12, at 480–504.

[50] *Id.* at 532–35.

[51] On selling indulgences, see DIARMAID MACCULLOCH, THE REFORMATION 121–125 (2004) [hereinafter MACCULLOCH, REFORMATION].

[52] MARTIN BRECHT, MARTIN LUTHER 1:460 (James L. Schaaf trans., 1985).

He rejected compulsory confession and accepted secular protection in the province of a sympathetic Elector of the Holy Roman Empire. After the violent German Peasants' War of 1524–25, the Reformation took firm hold, despite Luther's call for non-violence. Political rivalry grew among proliferating Protestant princes within the Empire for control of their own realms. Lutherans and Catholics contended first, then intolerant Calvinist rulers and their sects joined in, but radical sects of Jansenites, Unitarians, Anabaptists, and others rose up, too. Shockwaves reverberated through the Hapsburg dynasty and European monarchies alike as whatever medieval unity remained of Latin Christendom came apart.

The religious wars first broke out in the mid-16th Century in Germany between the Lutheran principalities of the north and the Catholic Holy Roman Empire, which brought in countries in the south, after church properties and treasure were confiscated by opposing religious parties, often changing hands on differing pretexts as rulers changed religion. The Diet of Augsburg and later the Peace of Augsburg of 1555 settled these first Christian wars by agreement under the principle *cuius regio eius religio*—the religion of the ruler shall be the religion of the realm.

As the 16th Century came to a close, the Spanish Inquisition was in full sway. Spain and the Austrian Hapsburgs were poised to achieve political dominance over France and the diverse cities and states of continental Europe, further checking the Holy Roman Empire, the last remnant of Christendom.[53] They would contend with Islam (the Ottoman Empire had conquered most of the Balkans in central Europe and had nearly taken Vienna), with Muscovy, with China, and with the Mughals of Southeast Asia to extend power within the vast Euro-Asian land mass.[54] The Hapsburg monarchs, whose dynastic powers were sustained by personal dominions of inheritance and marriage, received homage from a "patchwork pattern of dominions in which the estates of their component territories retained a separate identity, as well as substantial control over the making and local enforcement of the law."[55] The Hapsburg Austrian dominions (including Hungary and Bohemia), for example, were contiguous, but they were not a "state" as we know it today or even in the classical sense. The Holy Roman Empire, a loose assemblage of German princes whose emperor (often a Hapsburg) was chosen by seven

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[53] CHARLES W. INGRAO, THE HABSBURG MONARCHY 1618–1815, 4–6, 52 (1994).

[54] *See* PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS 16–30 (1987). The failure of Spain and the Hapsburgs strengthened a decentralized rivalry among the power centers of Europe that crystallized into the "European miracle" formative of the nation-state system and the explosion of science, trade, exploration, and economic growth.

[55] INGRAO, *supra* note 53, at 6.

Electors, similarly was not a "state."[56] But both had strong elements of quasi-federal hierarchical control over Christian polities.

D. *The End of Unity in Christendom: Protestant Reformation and Fragmentation*

Starting with Clovis, the Venerable Bede, and the monasteries, then with Charlemagne's Holy Roman Empire, the Crusades, and the Papal Revolution, Christendom achieved balance between temporal and spiritual powers. It finally had put down the most dangerous heresies to become the unifying culture that sustained the peoples of the Western Roman Empire after it was formally dismantled in 476. In his monumental history of the Reformation, Diarmaid MacCulloch noted:

> During the sixteenth century this western society, previously unified by the pope's symbolic leadership and by possession of that common Latin culture, was torn apart by deep disagreements about how human beings should exercise the power of God in the world, arguments even about what it was to be human. It was a process of extreme physical and mental violence.[57]

The Protestant Reformation became a third great division made up of dissident Christian beliefs, which fragmented further between Lutherans and Calvinists (Anglicans in Britain) and spawned radical sects of Mennonites, Anabaptists, Unitarians, Huguenots, and others. Luther and dissidents of the Reformation encouraged individual interpretations of Biblical texts available from the printing press, offering grace or salvation directly from God without interposition by priests or hierarchy. The apostolic authority of Christendom, already suffering, came under multiple direct assaults. Subjective interpretations and personal spiritual experiences undermined the entire hierarchical medieval order, in which written texts from direct apostolic succession and canon law were under the control of clerics, secular clerks, and academics. "Schisms, sects, and heresies were inevitable as individuals reinterpreted the Bible for themselves, whether mystically, literally, allegorically, or rationally."[58] Lutheranism and Calvinism were more intolerant of dissent from orthodoxies of their own, disciplining their own wayward adherents perhaps more cruelly than the Inquisition did Catholic heretics.

The idea that political unity depended upon religious unity either misled European princes and monarchs or provided opportunity for the ambitious

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[56] *See* HAYES, *supra* note 28, at 136–219 (providing a good general summary of Christian fragmentation, intolerance, and the beginning of the Thirty-Year War).

[57] MACCULLOCH, REFORMATION, *supra* note 51, at xix.

[58] LEVY, BLASPHEMY, *supra* note 29, at 58.

princes intent on coercing their people to conform to one official kind of Christianity.[59] The Council of Trent instituted systematic censorship and strengthened the Inquisition, calling on Catholic princes to enforce its decrees.[60] Luther now urged secular rulers to use force not only against Catholics, but also against Anabaptists and other radical Protestant sects.[61] In Geneva, Calvin would not tolerate Catholics and dissenting Protestants. He sent Michael Servetus to trial for doctrinal heresies and they burned him alive at the stake, provoking a major controversy over toleration and killing of heretics.[62] Thousands of people were executed as heretics. Similarly, Spanish and Portuguese monarchs, even Italian princes, employed all means to get rid of religious dissent and compelled their subjects to conform to a rigid Catholicism, with great success when Protestantism failed to take root there.

Many victims of the Inquisition in Spain were Moriscos (Muslim Moors who were given the choice of exile or baptism) and Marranos or Conversos (Jews who assimilated as New Christians by choice) suspected of relapsing into Judaism to avoid expulsion in the late 15th Century. Sometimes "they were professed Catholics who were thought to be too mystical or too 'liberal' or too tolerant. Such a famous Catholic as Ignatius Loyola, the founder of the Jesuits, was twice imprisoned by the Inquisition."[63] Benzion Netanyahu marshals impressive evidence to show that the Inquisition in Spain was driven not by religious orthodoxy of the Church but by the political ambition of the Christian Spanish monarchs, who used it to control the great Jewish families who were now New Christians.[64] Their enhanced stature and influence in business and government had

> aroused a new wave of hatred based on racism more than religion. . . . [T]he claim by the Spanish Inquisition around 1500 that the Jewish New Christians (Marranos) were secretly practicing their old religion was mostly untrue. Most of the Sefardic Jews became normal Christians . . . and today, one third of the modern Spanish nobility is descended from Jewish converts.[65]

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[59] HAYES, *supra* note 28, at 201.

[60] *Id.* at 202.

[61] *Id.*

[62] ZAGORIN, *supra* note 2, at 96.

[63] HAYES, *supra* note 28, at 202.

[64] *See* BENZION NETANYAHU, THE ORIGINS OF THE INQUISITION IN FIFTEENTH CENTURY SPAIN 5 (1995) ("[M]ajority's toleration of every minority lessens with the worsening of the majority's condition, especially when paralleled with steady improvement of the minority's status.").

[65] CANTOR, *supra* note 12, at 372.

Even in persecuting heretics—heresy was a religious crime—the objective of intolerance was to enhance political unity using religious belief, in effect to strengthen the central state's political power.[66]

Lutheran kings destroyed Catholicism and suppressed dissent in Scandinavia, Finland, and Estonia. In Scotland, Calvinist nobles led by John Knox deposed the Catholic queen Mary Stuart, seized government, and killed Catholics. In England, intolerance fluctuated, ending in Anglicanism with brutal harassment of Catholics and Protestant dissenters. When the Puritans took power for a time in the 17th Century, they in turn persecuted both Catholics and Anglicans. In Ireland, "official Protestantism became the elite sect and Roman Catholicism the popular religion, in a result unique in the whole Reformation."[67] The Ottomans were more tolerant of Christians once conquered (the conquests were bloody) than the Christians were of each other. Spain witnessed a similar situation during the Arab conquest of Iberia beginning in the 8th Century, until the Christian reconquest began to appear haphazardly in some locations from the north as early as the 11th Century. "By the early thirteenth century most of Spain was back in Christian hands . . . The Spanish Jews did not regret this reversal of fortune because their situation in the previous century of Moslem rule in Sefard (as they called Spain) was precarious."[68]

In France, religious intolerance against the Huguenots by militant and political Catholics resulted in the massacre of thousands of Huguenots on St. Bartholomew's day in 1572.[69] When Henry IV conciliated with the Edict of Nantes in 1598, granting a degree of religious freedom to Protestants in France, it was dictated less by a sense of justice than by political expediency.[70] In Germany, the emperor of the Holy Roman Empire and a majority of the electors remained Catholic.[71] Many princes followed Lutheranism, and some later converted to Calvinism. While they persecuted the dissident minorities within their realms, the people invented ways to live and let live.[72] The Hapsburg dynasty remained Catholic, maintaining a balance of power to preserve dynastic control throughout Europe, especially in Austria and Spain, thrusting it into conflict with the Protestant princes of the Holy Roman Empire and the emerging states of northern Europe.[73]

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[66] KAPLAN, *supra* note 3, at 309–312.

[67] MACCULLOCH, REFORMATION, *supra* note 51, at 394.

[68] CANTOR, *supra* note 12, at 371.

[69] HAYES, *supra* note 28, at 204.

[70] *Id.* at 205.

[71] *Id.* at 203.

[72] KAPLAN, *supra* note 3, at 127–234.

[73] *See generally* JAMES BRYCE, THE HOLY ROMAN EMPIRE (5th ed. 1904).

E. The Peace of Augsburg of 1555

The bitter struggle between the Empire and the princes led to the Peace of Augsburg of 1555. It perpetuated the myth that political unity required religious unity, but went in the other direction. The treaty affirmed the right of each prince to choose to be either Lutheran (not yet recognizing Calvinism) or Catholic and to compel all his subjects to conform to his religion under the principle of *cuius regio eius religio*.[74] At first, "every prince was permitted to enforce either the Catholic or the Lutheran faith in his lands so that subjects who could not conform must emigrate. This extraordinary compromise saved the theory of religious unity for each state while destroying it for the Empire."[75] Then Calvinism appeared and, in direct contravention to the settlement, began to proselytize with zeal and effectiveness. "'The Calvinist dragon,' declared a Lutheran writer, 'is pregnant with all the horrors of Mohammedanism.'"[76] The Augsburg settlement had an important rule, the Ecclesiastical Reservation, that no "ruling prelate, abbot, bishop or archbishop, might retain his lands if he should at any time be converted to the Protestant religion."[77] The Reservation was not respected by Calvinists, and they were converting as many princes and abbots and bishops as they could. "The libertarian movements, the convulsive outbursts of mercantile or peasant insurrection, terrified those unhappy rulers who were perched between rebellion beneath and oppression above . . . . [T]he natural alliance between those who demanded liberty of conscience and those who demanded political freedom was broken asunder."[78]

Once political and sectarian dissent broke the unity of Protestant dissent, the Peace of Augsburg no longer worked. Calvinist princes revolted from their exclusion, while the Counter-Reformation reinforced the Emperor's right to enforce Catholicism in his dominions, including Spain and Austria. Forced conversion or emigration followed, with intolerance spreading more widely and becoming more vicious to cleanse the realm, not unlike the Balkan wars in the former Yugoslavia in the late 20th Century. There was no real devotion to reason, to scientific truth, to abstract principles of religious freedom, or to tolerance for another's beliefs or opinion. All devout Christians attached to the truth of their own beliefs and the spread of them as dogma were urged on by their own princes and their armies of mercenaries, who were not loyal to anyone. Presently, this widespread religious intolerance coextensive with

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[74] INGRAO, *supra* note 53, at 27, 50–51.

[75] C.V. WEDGWOOD, THE THIRTY YEARS WAR 42 (1939).

[76] *Id.* at 42.

[77] *Id.* at 43.

[78] *Id.*

political power became the legal rule of the day. The militant Reformed Protestants were not alone. "Archbishop Abbot of Canterbury eagerly looked in 1618 for an alliance which would stretch from Scotland to Transylvania, so 'by piece and piece, the kings of the earth that gave their power unto the Beast shall now tear the whore and make her desolate.'"[79]

The "Defenestration of Prague" (May 23, 1618) caused the revolt in Bohemia to erupt into "one of the longest and most destructive civil and international wars in human annals—the Thirty Years' War (1618–1648)."[80] The military campaigns, stratagems, and the invasion by Gustavus Adolphus from Sweden and his enemy Wallenstein with their mercenary armies are well beyond the scope of this Article, but they were brutal, especially to villagers and civilian populations.

IV. THE PEACE OF WESTPHALIA

The Congress of Westphalia convened after lengthy preparations to bring the savage Christian wars to a close. It opened December 4, 1644, with 135 delegates. They included theologians, philosophers, and diplomats.[81] A hundred years of previous attempts had failed to end the religious violence after the Protestant upheaval. This congress was the first of the great congresses of the modern era. The plan called for two separate negotiations, although formalities delayed serious work. At Münster, the French would treat with the Holy Roman Empire under mediation of the Papacy and Venice. At Osnabrück 30 miles away, France and the Empire would treat with Sweden under mediation of Christian IV of Denmark, thus avoiding the problem of seating papal nuncios to negotiate with Protestant heretics.

A. A New Political Order of Sovereign States

The resulting Peace of Westphalia marked the beginning of a new political order: a system of sovereign territorial nation-states that was emerging in Europe even before the break-up of Christendom. Leo Gross's classic article written in 1948 after three hundred years of the new political order remains still the best summary:

> The Peace of Westphalia, for better or worse, marks the end of an epoch and the opening of another. It represents the majestic portal which leads from the old into the new world. The old world, we are told, lived in the idea of a Christian common-

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[79] MACCULLOCH, REFORMATION, *supra* note 51, at 494.

[80] HAYES, *supra* note 28, at 203.

[81] *See generally* GEOFFRY PARKER, EUROPE IN CRISIS: 1598–1648 (1979); J. V. POLIŠENSKÝ, THE THIRTY YEARS WAR (Robert Evans trans., 1971); WEDGWOOD, *supra* note 75; CHARLES WILSON, THE TRANSFORMATION OF EUROPE: 1558–1648 (1976).

> wealth, of a world harmoniously ordered and governed in the spiritual and temporal realms by the Pope and Emperor. This medieval world was characterized by a hierarchical conception of the relationship between the existing political entities on the one hand, and the Emperor on the other. For a long time preceding the Peace of 1648, however, powerful intellectual, political, and social forces were at work which opposed and, by opposing them, undermined, both the aspirations and the remaining realities of the unified control of Pope and Emperor. In particular the Reformation and Renaissance, and, expressive of the rising urge of individualism in politics, nationalism, each in its own field, attacked the supreme authority claimed by the Pope and the Emperor. . . . In the spiritual field the Treaty of Westphalia was said to be 'a public act of disregard of the international authority of the Papacy.' In the political field it marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority.[82]

The agreements stabilized the borders of European nations and solidified the emerging system of territorial nation-states under a rough law of nations. "The shifting of the balance between Church and State was in process in 1618 and might well have completed itself without unnecessary bloodshed. Calvinism . . . was practised by more of the population before than after the war."[83] The hidden victim, however, was the Christian religion. It survived but with deep popular skepticism about the coarseness of religious polemics.[84]

In contrast with the power of Spain, Portugal, England, and the United Provinces, "[i]n the Empire there was no central authority, private wealth was declining, and the principle of *cujus regio ejus religio* meant that a man could have some degree of freedom of conscience without crossing the Atlantic."[85] The war was an "unmitigated catastrophe"[86] in Germany and equally

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[82] Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 28–29 (1948) (citations omitted).

[83] WEDGWOOD, *supra* note 75, at 520–21.

[84] *See* ELMER A. BELLER, PROPAGANDA IN GERMANY DURING THE THIRTY YEARS WAR (1940) (reproducing prints made from twenty-four plates to reach all classes, literate and mostly illiterate, who received satisfaction at broadsides for political effect at an enemy's defeat or an event such as the Peace of Westphalia with benevolent France and Sweden behind a comic imperial trinity).

[85] WEDGWOOD, *supra* note 75, at 522.

so in Europe, though in a different way. "The Peace of Westphalia was like most peace treaties, a rearrangement of the European map ready for the next war . . . and the last of the wars of religion merged insensibly into the pseudo-national wars of the future."[87] The Vatican condemned the peace. Extreme Catholics and Protestants were not satisfied. "[M]en might have grasped the essential futility of putting the beliefs of the mind to the judgement of the sword. Instead they rejected religion as an object to fight for and found others."[88]

Territorial arrangements were adjusted to accommodate religions and to minimize immigrations.[89] Protestants remained in the north and Catholics stayed to the south, thus protecting France from a united Germany. The practical guaranties that the treaties would be observed were of the highest importance.[90] Citizens or subjects in each state, city, or province were ultimate beneficiaries of the agreement among all the major European states and provinces.[91] The treaties settled public and private grievances, confiscations based on religion and civil wrongs.[92]

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[86] *Id.* at 525.

[87] *Id.*

[88] *Id.* at 526.

[89] *See generally id.* at 505–26. In summary, the Peace of Westphalia also accomplished the following territorial arrangements:

1. Switzerland and the United Provinces were formally recognized as independent.
2. Bavaria received Upper Palatinate with an electoral vote in the Imperial Diet.
3. Lower Palatinate electorate was restored to the Empire.
4. Brandenburg was given Eastern Pomerania (which later enabled Prussia under Bismarck to defeat France).
5. Sweden became one of the Great Powers with Imperial fiefs.
6. German principalities retained their liberties from the Empire.
7. The Emperor was confined to Bohemia and Hungary, in effect transforming the Holy Roman Empire into the Austro-Hungarian Empire. River outlets passed to Sweden and the United Provinces.
8. France with the greatest gains took Alsace and extended its frontiers, breaking the power of the Hapsburgs.

[90] *See* Gross, *supra* note 82, at 24 (quoting studies by Sir James Headlam-Morley that "no guarantee was more important or has been more often referred to than that included in the treaties of Westphalia").

[91] *Id.* (citing C. VAN VOLLENHOVEN, THE LAW OF PEACE 85 (1936)); *see also* KAPLAN, *supra* note 3, at 220.

[92] For the many specific treaty settlement provisions of the Treaty of Westphalia in English translation at the Avalon project from Yale University, see *infra* note 98.

The Treaty of Westphalia is a public order obligation: while each independent and sovereign state or province might have a single established religion of the ruler's own choice within its territory (from the Peace of Augsburg), these states were obligated to each other to allow certain religious freedoms for those Christians and their churches who were not of the established religion within a state. The practical effect of these treaty provisions was not so clear in the beginning. Benjamin Kaplan points out "that religious violence—popular, official, military—continued in many parts of Europe in the late seventeenth and early eighteenth century. The age of religious wars had not yet ended."[93]

B. "Liberty of the Exercise of Religion"

Tucked away in the many provisions of these complex treaties is the language of religious freedoms inside the realm of each sovereign ruler. Berman notes: "[T]he non-established religious confessions, whether Protestant or Roman Catholic, were given the right to assemble and worship as well as the right to educate their children in their own faith. Thus a principle of religious toleration was established between Lutherans, Calvinists, and Roman Catholics."[94]

In *The Intellectual History of the Establishment Clause*, Noah Feldman writes of his surprise to find that "there is less in the historical literature than one might expect when it comes to the origin of the idea of liberty of conscience."[95] I shared that surprise when looking for a scholarly literature on the religious freedom clauses in the Treaty of Westphalia. Have we missed examining those clauses in historical context as a source for liberty of conscience? Do we know fully the "intellectual leap" that influenced negotiations leading to those exceptions?[96]

The text of the Treaty of Osnabrück says:

> [S]ubjects who in 1627 had been debarred from the free exercise of their religion, other than that of their ruler, were by the Peace granted the right of conducting private worship, and of educating their children, at home or abroad, in con-

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[93] KAPLAN, *supra* note 3, at 343.

[94] BERMAN, LAW AND REVOLUTION II, *supra* note 5, at 61–62.

[95] Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 355 (2002). "The paucity . . . is surprising because liberty of conscience is such a fundamental part of modern conceptions of basic rights. It may be that scholars have not gone to great lengths to find out precisely where the idea of conscience came from because, today, the idea seems so intuitive." *Id.*

[96] Feldman examines Roger Williams's 1644 book *The Bloudy Tenent of Persecution* but not any influence it may have had on these negotiations. *Id.*

> formity with their own faith; they were not to suffer in any civil capacity nor to be denied religious burial, but were to be at liberty to emigrate, selling their estates or leaving them to be managed by others.[97]

The Treaty of Münster restored the churches and ecclesiastical estates of those of the Confession of Augsburg as they were in 1624. It guaranteed "the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God."[98] It incorporated "the Liberty of the Exercise of Religion" in the Treaty of Osnabrück to serve the general tranquility of the Empire.[99]

According to Kaplan, there were three types of "liberty of the exercise of religion": domestic devotion, public religious services, and private religious services.[100] In the third category, a cultural fiction developed in public/private churches as a way to permit toleration for minority sects and Jews. Services were carried out by clergy "in their own houses or in other houses designated

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[97] Gross, *supra* note 82, at 22 (quoting A. W. Ward, *The Peace of Westphalia*, *in* 4 THE CAMBRIDGE MODERN HISTORY 416 (1934)).

[98] The English translation of the relevant articles from the Treaty of Münster reads:

> XXVIII. That those of the Confession of Augsburg, and particularly the Inhabitants of Oppenheim, shall be put in possession again of their Churches, and Ecclesiastical Estates, as they were in the Year 1624. as also that all others of the said Confession of Augsburg, who shall demand it, shall have the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God.
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> * * *
>
> XLIX. And since for the greater Tranquillity of the Empire, in its general Assemblys of Peace, a certain Agreement has been made between the Emperor, Princes and States of the Empire, which has been inserted in the Instrument and Treaty of Peace, concluded with the Plenipotentiarys of the Queen and Crown of Swedeland, touching the Differences about Ecclesiastical Lands, and the Liberty of the Exercise of Religion; it has been found expedient to confirm, and ratify it by this present Treaty, in the same manner as the above said Agreement has been made with the said Crown of Swedeland; also with those call'd the Reformed, in the same manner, as if the words of the above said Instrument were reported here verbatim.

YALE LAW SCH., THE AVALON PROJECT [hereinafter AVALON PROJECT], *available at* http://avalon.law.yale.edu/17th_century/westphal.asp.

[99] *Id.*

[100] "With this tripartite distinction the diplomats in Westphalia acknowledged that much more than family prayers went on in private 'houses' . . . describing 'churches' that lacked the external signs of a church." KAPLAN, *supra* note 3, at 194.

for the purpose" and not "in churches at set hours."[101] Kaplan notes that the practice "enabled Europeans to accommodate dissent without confronting it directly, to tolerate knowingly what they could not bring themselves to accept fully."[102]

In surveying the main and seemingly endless scholarly literature on the Religion Clauses in the American Constitution, I have found so far no discussion of the Westphalian provisions granted to protect religious beliefs and churches and the cultural fictions that suggest an underlying common principle of freedom of conscience, which dissidents understood from Martin Luther. Leo Gross's scholarship does refer to some European studies, but I have not been able to find a scholar who notes the similarity between the precise use of terms quoted above from the treaty provisions in 1648 and the Religion Clauses of the American Constitution. To be sure, the best scholarship mentions the Protestant Reformation and the Peace of Augsburg in 1555, noting that control by a sovereign ruler over a single establishment of religion was also the structure of the Westphalian peace, against which the Americans were rebelling for their religious freedoms.[103] While the principles of liberty of religious freedom were being written into the treaty, however, the Puritans were crossing the Atlantic.

The Reformation, of course, was a uniquely Western development. Eastern Orthodox Christianity never quite experienced the same kind of internal disintegration, even after the Islamic conquest of Constantinople in 1453 ended the Byzantine Empire's thousand-year rule. Islam's contending branches were contained within its empires. Most modern theorists view the Protestant Reformation structurally as advancing individualism over the communitarian Middle Ages of Christendom: Western philosophical liberalism,[104] the social contract theories of natural rights,[105] and, more controversially, Rights of Man from the Enlightenment. American "exceptionalism,"[106]

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[101] *Id.*

[102] *Id.* at 195.

[103] *See generally* AMAR, *supra* note 19; LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 92, 101 (1999) [hereinafter LEVY, BILL OF RIGHTS]; Smith, *supra* note 22; McConnell, *supra* note 20, at 1468–69; MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2009).

[104] *See generally* BARUCH DE SPINOZA, TRACTATUS THEOLOGICO-POLITICUS (1670); BARUCH DE SPINOZA, ETHICS (1670).

[105] *See generally* THOMAS HOBBES, THE LEVIATHAN (1651); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1689).

[106] SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 53–76 (1997).

"the spirit of capitalism,"[107] and "political liberalism" found a source here, too.[108] The story is that individualism from the Protestant Reformation and reason from the Enlightenment tamed violence, channeling it into competition—political, religious, and economic.

Kaplan's bottom-up study of everyday European life does show religious tension and often physical conflict among people in their daily lives; yet, when left alone by the rulers or established churches, people at local levels everywhere tended to devise many ingenious ways of accommodating their religious differences in practice.[109] Those inner attitudes surely were no different from the liberty of conscience sought by the first settlers in America. The public order obligation among the political parties was toleration, but the rulers thought of it as indulgence. And Americans were not to be indulged.[110]

V. ARCHITECTURE OF FREEDOM OF RELIGION IN PUBLIC ORDER

A. Freedom of Religious Belief and the General Security

The Treaties of Münster and Osnabrück spelled out public order obligations. The specific undertaking in Article 123 of the Münster treaty was that the peace concluded shall remain in force and that all parties "shall be obliged to defend and protect all and every article of this peace against anyone, without distinction of religion."[111] Ideas from the Congress of Westphalia, as Leo Gross pointed out, constituted the beginnings of a world structure of equal and independent sovereign territorial states governed by interna-

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[107] *See generally* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1905).

[108] *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993).

[109] KAPLAN, *supra* note 3, at 358.

> In the centuries between Reformation and French Revolution, Europeans discovered that, in practice, they could often manage and contain confessional conflict. As limited, tension-ridden, and discriminatory as their accommodations and arrangements were, they can open our eyes to the unique qualities of the toleration we practice today and the possibility of other options.

Id.

[110] LIPSET, *supra* note 106, at 20 (noting that "America began and continues as the most anti-state, legalistic, and rights-oriented nation").

[111] AVALON PROJECT, *supra* note 98. Article CXXIII reads in its entirety:

> That nevertheless the concluded Peace shall remain in force, and all Partys in this Transaction shall be oblig'd to defend and protect all and every Article of this Peace against any one, without distinction of Religion; and if it happens any point shall be violated, the Offended shall before all things exhort the Offender not to come to any Hostility, submitting the Cause to a friendly Composition, or the ordinary Proceedings of Justice.

Id. art. CXXIII.

tional law that would include respect and toleration for dissident religious minorities and freedom to exercise their religious beliefs.[112] Although balances of power have shifted in Europe and globally, and empires have come and gone, this framework has continued through the Concert of Europe after the Napoleonic Wars to the Peace of Versailles and the League of Nations after the First World War and has survived in the Charter of the United Nations.[113] The Westphalian paradox lies in balancing general security with respect for the liberty of conscience and human dignity.

There were problems. Why should sympathetic and ambitious political leaders want to stay out of a bordering state, when Catholic or Protestant minorities (or even radical cults) call on them for protection? If despised religious minorities may exercise their religious beliefs publicly in their churches or in private homes within the realm, they might not be compelled to form an alliance with co-religionists in arms in some other province under control of a sympathetic and ambitious foreign prince. And the tendency would be to keep any conflict at a low level—to contain it, even while tolerating disputation. At least that was the nub of the idea in the treaties. And even when it did not work out, in the late 17th Century and early 18th Century wars, it remained a negotiated model for non-intervention principles generally.

This Westphalian system of public order was not only for independent sovereigns in their external relations. The treaty required the states to internalize "all and every one of these Articles."[114] It also provided a crude internationalization of these obligations with protecting powers authorized to oversee compliance in place of appeals for protection by persecuted religious sects. The future effect became a general obligation of non-intervention in the internal affairs of a sovereign state based on religion. It reduced the potential

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[112] Gross, *supra* note 82 (arguing that sovereign equality of all members sustains the establishment of the hegemony of a group of Great Powers as guardians of international peace and security, a legitimate form of a balance of power based upon the principle of toleration, which also demanded equality between Protestant and Catholic states and provided some safeguards for religious minorities).

[113] *Id.* at 20.

[114] AVALON PROJECT, *supra* note 98, art. CXX.

> For the greater Firmness of all and every one of these Articles, this present Transaction shall serve for a perpetual Law and establish'd Sanction of the Empire, to be inserted like other fundamental Laws and Constitutions of the Empire in the Acts of the next Diet of the empire, and the Imperial Capitulation; binding no less the absent than the present, the Ecclesiasticks than Seculars, *whether they be States of the empire or not*: insomuch as that it shall be a prescrib'd Rule, perpetually to be follow'd, as well by the Imperial Counsellors and Officers, as those of other Lords, and all Judges and Officers of Courts of Justice.

Id. (emphasis added).

for armed conflict with an external enemy who otherwise might have formed an armed alliance with a religious or dissident minority. The treaties thus simultaneously recognized crudely the sovereign autonomy of each state subject to a budding liberty of religious freedom within.

Changing economic conditions beginning in the 16th Century also reinforced this strategic compact of public order—but at a price. Ambitions of sovereigns in centralizing their power were linked with the economic ability to pay national armies to compete with those financed from Spanish gold and silver from the Americas under Phillip II. Peter Drucker believes that paying for war was the principal reason for inventing national sovereignty and exploiting mercantilism as foreign policy:

> The modern state was invented by the French political philosopher Jean Bodin in his 1576 book *Six Livres de la Republique*. He invented the state for one purpose only: to generate the cash needed to pay the soldiers defending France against a Spanish army financed by silver from the New World—the first standing army since the Romans' more than a thousand years earlier. Mercenaries have to be paid in cash, and the only way to obtain a large and reliable cash income over any period—at a time when domestic economies had not yet been fully monetized and could therefore not yield a permanent tax—was a revenue obtained through keeping imports low while pushing exports and subsidizing them.[115]

And the natural right of property in the self is close to owning one's own conscience (Locke said as much), permitting monetization of surplus produced and treating both property and liberty of conscience as inalienable rights. Ownership of property and liberty of conscience were both part of Protestant Calvinist doctrines.[116]

B. A Sovereign's Dilemma

To restate my initial paradox, why should a sovereign ruler of a realm tolerate the free exercise of religion within his territory when incompatible with his established religion? My brief historical review reveals at least three responses: expediency, individual morality, and the common good of the community.

Benjamin Kaplan's examination of religious toleration and religious conflict in early modern Europe describes expediency through local accommodation from the ground-up:

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[115] Peter F. Drucker, *Trading Places*, 79 NAT'L INT. 101, 105 (2005).

[116] *See generally* WEBER, *supra* note 107.

> In the centuries between Reformation and French Revolution, Europeans discovered that, in practice, they could often manage and contain confessional conflict. As limited, tension-ridden, and discriminatory as their accommodations and arrangements were, they can open our eyes to the unique qualities of the toleration we practice today and the possibility of other options.[117]

The free exercise of religion within an established national religion on this view was an important strategic tool to provide for the general security by confining religious passions, channeling conflicts to their most local levels, where inventive religious practices of ordinary people uninterested in fighting over them might avoid conflict.[118]

A second explanation is moral: that individual freedom of conscience to choose a religious belief not coerced by the state is a moral consequence of the Protestant Reformation, espoused by John Locke in particular as a natural right a state should not abridge.[119] Max Weber's early 20th Century study concluded as well that a pervasive Protestant ethic of individualism and toleration released a positive spirit of capitalism and enterprise. That, too, has a moral quality with religious undertones. Moral belief systems shape cultural practices, although empirical evidence a century later now questions Weber's thesis.[120]

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[117] KAPLAN, *supra* note 3, at 358.

[118] Roger Williams would allow general and neutral laws to intrude upon the freedom of conscience when conduct, however pure, would threaten peace and security, suggesting equal respect for consciences. *See* NUSSBAUM, *supra* note 103, at 65–68 (comparing Williams and Locke).

[119] *Id.* ("Locke speaks in terms of separation of jurisdictions, with exceptions only if generally applicable and neutral. For him religion and politics don't overlap at all."). For Williams, the moral overlap is there but is derived from "natural goodness" from within human consciences, not from religious premises that are coercive. *Id.* Feldman disagrees with Nussbaum and makes a rigorous argument from intellectual sources that Locke's liberty of conscience had its roots in religion and became generally accepted by the time of the Revolution. Feldman, *supra* note 95, at 384.

[120] PIPPA NORRIS & RONALD INGLEHART, SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE 160–62 (2004). The authors point out:

> Western societies that were the first to industrialize, have gradually come to emphasize Postmaterialist values, giving higher priority to the quality of life than to economic growth. In this respect, the rise of Postmaterialist values reverses the rise of the Protestant Ethic. Today, the functional equivalent of the Protestant Ethic is most vigorous in East Asia and is fading away in Protestant Europe, as technological development and cultural change become global.

Id. (citing RONALD INGLEHART, MODERNIZATION AND POSTMODERNIZATION ch. 7 (1997)).

Religious toleration also recites the liberal moral ideals of reason and rights of man that followed in the Enlightenment. Those who fled persecution in Europe (the Puritan migration began while the religious wars were in full sway) as well as others brought with them to America a moral American "exceptionalism" from religious sects having to compete for salvation in a vast new world. The political theorist John Rawls found important roots of liberal society in "the long controversies over religious toleration in the sixteenth and seventeenth centuries . . . [when] something like the modern understanding of liberty of conscience and freedom of thought began."[121] Because of this moral inheritance, it is often observed, the United States has never experienced religious wars like those in Europe.[122]

A third justification of toleration reaches back into medieval Christendom and to ancient Greek and Roman civilizations. Thomas Aquinas and Arab scholars reconciled reason and faith, Aristotle and Augustine, and the community's common good with the "natural rights" of individuals. The common good requires human dignity and freedom. It cannot flourish outside a community where individual duty entails cooperation and submission. The idea of a sovereign self was a medieval theological concept. It did not, as most assume, originate with the Western Reformation or Enlightenment, when modern natural rights theories presumed property in the self, as Locke's Letter on Toleration and his Treatise develop. The social contract and the rights of man, including Locke's liberty of conscience, must have pulled on these longer roots submerged within the medieval *corpus christi* of Christendom.[123] Theologically, a sacred conscious self is located there, with a first duty to God through the church for the benefit of the community of God.[124] Luther's protest is in that tradition, his duty to God in light of conscience is almost Stoic. Madison's presupposition in the Memorial and Remonstrance is an "'inner church' of conscience" whereby "[t]he Religion . . . of every man must be left to the conviction and conscience of every man."[125] Steven Smith locates this in-

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[121] RAWLS, *supra* note 108, at xxvi.

[122] ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 549–50 (2010).

[123] Martha Nussbaum argues for a shared moral overlap such as the Roberts Court unanimously finds in the Religion Clauses requiring special solicitude for church religious freedoms of inner governance. NUSSBAUM, *supra* note 103, at 67–68. We catch glimpses of this view in the special spiritual jurisdiction of the church in the Papal Revolution.

[124] *See* BRIAN TIERNEY, *Religious Rights: A Historical Perspective*, *in* RELIGIOUS LIBERTY IN WESTERN THOUGHT 29, 43–44 (1996); BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW 1150–1625 (1997); RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT (1979).

[125] Smith, *supra* note 22, at 33 (quoting JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785)); *cf.* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT) AND A LETTER CONCERNING TOLERATION 123, 129 (rev. ed. 1976) (asserting that

ner church in the unifying idea of subsidiarity and the conciliar movement from the Church in the Middle Ages.[126] These powerful ideas survive today in the secular idea of "inherent dignity and of the equal and inalienable rights of all members of the human family"—expressed in the preamble to the Universal Declaration of Human Rights—whose duty, ironically, is not to God first, but to the community "in which alone the free and full development of his personality is possible."[127]

VI. PROTESTANTS FROM EUROPE TRANSPLANTED IN AMERICA

A. The Intolerant City on the Hill

In the American colonies in 1640, well before the exhausting Christian wars of religion came to an end in the Peace of Westphalia, Puritan Governor John Winthrop of the Massachusetts Bay Colony referred to his new settlement as a city on a hill. It was not a tolerant city. Ten years earlier, these Puritans (to be distinguished from the Pilgrims—religious separatists—who settled in Plymouth) fled religious persecution they encountered in the English Reformation. They were Calvinists, who wanted to purify, not separate from, the Church of England.[128] While the original Massachusetts Bay Company was chartered for economic profit, the colony soon became a Calvinist theocracy (like Calvin himself established in Geneva) under Winthrop, who wanted to build "a holy community in America [to] serve as an example and so redeem England" with this "errand into the wilderness."[129]

The Puritans promised

> to obey their heavenly king in return for His blessings in a Promised Land. Such positive freedom meant to escape the slavery of sin born of one's own corrupt soul and thus be at liberty to do what was right—the exact opposite of a libertarian's negative freedom from external constraints.[130]

"true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God . . . [and] it cannot be compelled to the belief of anything by outward force").

[126] BRIAN TIERNEY, FOUNDATIONS OF THE CONCILIAR THEORY: THE CONTRIBUTION OF THE MEDIEVAL CANONISTS FROM GRATIAN TO THE GREAT SCHISM (1955).

[127] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), pmbl. art. 29(1) (Dec. 10, 1948).

[128] ZAGORIN, *supra* note 2 at 190–91.

[129] WALTER A. MCDOUGALL, FREEDOM JUST AROUND THE CORNER: A NEW AMERICAN HISTORY: 1585–1828, 57 (2004).

[130] *Id.* at 59.

A few years later, Captain John Mason led men from the new colony in a surprise attack on a Pequot Indian village to avenge savage murders and prevent further hostilities by the tribe.[131] William Bradford, an early settler, described the massacre:

> Those that escaped the fire were slain with the sword, some hewed to pieces, others run through with their rapiers, so as they were quickly dispatched and very few escaped. It was conceived that they thus destroyed about 400 at this time. It was a fearful sight to see them thus frying in the fire and the streams of blood quenching the same, and horrible was the stink and scent thereof; but the victory seemed a sweet sacrifice, and they gave the praise thereof to God, who had wrought so wonderfully for them, thus to enclose their enemies in their hands and give them so speedy a victory over so proud and insulting an enemy.[132]

So began the American experience with religion, government, and enterprise in New England. The Puritans and other sects thought God had given them a new Zion exceptionally, theirs to claim by right later to win political independence from Europe, to assume free and equal status among nations of the world.[133] "Puritans no more believed in democracy than did the Stuarts . . . ."[134]

Winthrop banished Roger Williams from the colony in 1635 for insisting that the "colony's churches should make a complete and open separation from the impure and anti-Christian Anglican Church."[135] After founding Providence and Rhode Island on separatist principles grounded in freedom of conscience, he travelled to England to publish in 1644 his great work, *The Bloudy Tenent*, which advanced the "fundamental thesis that Christ had ordained a complete distinction between the civil-political and the religious-spiritual domains, and hence that the magistrate was excluded from all power over the church and religion."[136] He was challenging John Cotton's defense of religious persecution justifying banishment.

Though difficult to determine where Williams's ideas originated, they faintly echo those both from the Papal Revolution and from the Protestant

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[131] *See* EDWIN S. GAUSTAD, ROGER WILLIAMS (LIVES AND LEGACIES) ch. 2 (2005).

[132] Howard Zinn, *The Power and The Glory: Myths of American Exceptionality*, BOSTON REVIEW, Summer 2005, bostonreview.net/BR30.3/zinn.php.

[133] *See generally* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

[134] MCDOUGALL, *supra* note 129, at 58.

[135] ZAGORIN, *supra* note 2, at 198.

[136] *Id.* at 199–200 ("It is difficult to determine the sources of his ideas.").

Reformation because civil power profanes religion, while the sacred employs the civil power coercively. Each person's conscience seeks light in a dark wilderness in the journey of life. "To impose an orthodoxy upon the conscience is nothing less . . . than 'Soule rape.'"[137] Williams's work was published in London just as the Congress of Westphalia gathered, well before John Locke's letter on toleration and a century and a half before Madison's remonstrance. Its influence is clear for Locke and Madison. How likely was it that those who were negotiating the Westphalian peace also knew of Williams's book?

B. The Protestants of Protestantism

At the time of the American Revolution, Edmund Burke saw in sectarian Americans such as these Puritans the "Protestants of Protestantism, the Dissenters of Dissent which predisposed them to moralism and individualism."[138] Max Weber later confirmed that the spirit of capitalism was present from the beginning in the strong religious beliefs of the Puritans and the Protestant Reformation.[139] Even secular liberalism in Europe and the United States has religious roots in the Protestant Establishment.[140] Such a cultural predisposition might seem as unifying as Catholic Christendom was in pre-Reformation Europe.[141]

Nevertheless, Bernard Bailyn shows how widespread were the uncoordinated attacks on establishments of religion.[142] They magnified a sense of paranoia, convinced of a secret conspiracy to establish an American episcopate, "an ecclesiastical conspiracy against American liberties latent among nonconformists through all of colonial history."[143] These all came together, "mingling

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[137] NUSSBAUM, *supra* note 103, at 37. For Williams's work and its relationship to John Locke's, see generally *id.* at 34–71.

[138] LIPSET, *supra* note 106, at 60 (citing Burke's speech to the House of Commons, proposing reconciliation with the Colonies). Anne Hutchinson challenged the whole framework of Puritan piety of the "elect" as early as 1635; she protested the Puritan protest. MACCULLOCH, REFORMATION, *supra* note 51, at 521.

[139] *See generally* WEBER, *supra* note 107.

[140] *See* BERMAN, LAW AND REVOLUTION II, *supra* note 5, at 258 (discussing the return of spiritual jurisdiction from the pope to the kings).

[141] *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 369 (2001) (noting that the origins of the modern Establishment Clause lay not in 18th Century resistance to Anglican establishments, but in 19th and 20th Century Protestant Establishment of public common schools that read the King James Bible and viewed support for religious schools as subtext for tax support of Catholic parochial schools, which soon began to crumble like Christendom did post-Protestant Reformation in 16th Century Europe).

[142] *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 246–72, 96–97 (1992).

[143] *Id.* at 96–97.

sectarianism and secular reform, that would result, ultimately, in the disestablishment of religion in the states and in the United States of America."[144]

C. Sovereignty of States after Revolution

By the time of the American Revolution, the Peace of Westphalia of 1648 had become the new order of sovereign territorial states in Europe, separating secular power from any unifying religion. In America, sovereignty of the newly independent states occurred within that framework through the Declaration of Independence and Revolution. "[F]issiparous tendencies well known from the first days of the Reformation became a general feature of American religious life. Toleration accommodated difference, but it also produced among the different groups a pattern of accommodation to the Protestant model that made coexistence easier than it might have been."[145]

Thomas Jefferson dealt directly with the state sovereignty question in the Declaration of Independence by invoking a "decent respect for the opinions of mankind" to justify the dissolution of the political "bands" connecting the colonies to Great Britain.[146] The abuse of self-evident axioms of inalienable human rights that would include religious freedom justified the colonies in breaking away to "assume among the powers of the earth, the separate and equal station" to which they were entitled.[147] These were the structural presuppositions of territorial sovereignty and equality of the Westphalian system of states. Each newly independent state in the federal alliance thus acquired the capacity to establish or disestablish state religion. Popular sovereignty meant consent of the majority, a social contract to establish government, and freedom of individual conscience in religious belief and practice locally, within each sovereign state.

The founding generation saw firsthand that religious unity would not and could not work in America. There were far too many robust sects with ministers competing for members in different colonies.[148] The federal union they created after the Revolution was clearly disestablishment at the national level. No central legislative power pertaining to religion would be delegated to the federal government in the new constitution. That did not mean the founding was anti-religion. Historian Walter McDougall explains:

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[144] *Id.* at 251.

[145] WALZER, *supra* note 23, at 67–68.

[146] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[147] *Id.*

[148] WALZER, *supra* note 23, at 247–72. Except for anti-establishment Pennsylvania, "the pattern of establishments, like that of so many other areas of life in the colonies, was the result of unsystematic, incomplete, pragmatic modification of a traditional model." BAILYN, *supra* note 142, at 247–48.

> The reason was not that they were enlightened secularists who thought faith unimportant. On the contrary, a large majority of the Framers were confessing Christians and church officers, while even skeptics repeatedly named faith and morals indispensable props for self-government. But Americans were a people of many denominations; to favor or punish one or another was sure to imperil the Union. So the Framers said nothing about religion because it was just too important; the only solution lay in forbidding federal restrictions on free exercise of religion and leaving it up to states to decide whether to have local religious establishments. Madison even endorsed religious liberty as the best means to promote sincere faith in people, and of course almost all the Framers agreed . . . that civil and religious liberty leaned on each other.[149]

In the previous century, the European solution in the Peace of Westphalia was to separate political rule from the Roman Catholic religion of the Holy Roman Empire as a condition of peace. Each ruler or state was sovereign and free from an imposed religion but could have his or its own religious establishment, a structure that placed the state religion under the sovereign subject to certain religious freedoms for those not of a ruler's faith.[150]

The American solution left the religion issue to be decided locally with the states, not with national government. When contemporary scholars explore Protestant analogues for this local structure, they tend to discuss only the general terms of the Peace of Augsburg of 1555. Akhil Amar, for example, writes that the original American establishment clause "simply calls for the issue to be decided locally (in this respect it is the American equivalent of the European Peace of Augsburg in 1555 and Treaty of Westphalia in 1648, which decreed that religious policy would be set locally rather than imperially)."[151] While that is true, Amar leaves out the Westphalian provision for local freedom of religion. Levy similarly cites the European experience with a single established church following the Protestant Reformation, without mentioning the Westphalian structure of limited liberty for free exercise of religion by dissidents.[152] Martha Nussbaum credits the Treaty of Westphalia only with ending "the century's bloody wars of religion, but in a way that was not reassuring to religious minorities [because the] treaty's stated principle . . . (whoever's region it is, his shall the religion be), allowed local rulers to es-

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[149] MCDOUGALL, *supra* note 129, at 312.

[150] *See* BERMAN, LAW AND REVOLUTION II, *supra* note 5.

[151] AMAR, *supra* note 19, at 34.

[152] LEVY, BILL OF RIGHTS, *supra* note 103, at 101.

tablish a chosen religion in each domain, persecuting internal dissidents."[153] She does not address the treaty provisions for protecting the religious freedom of these dissidents.

Steven Smith also makes no mention of these treaty provisions when proposing a medieval inner "self" as a source for recognizing an inner freedom of the church under the Religion Clauses of the American Constitution. This inner "self" would create a jurisdictional immunity for the freedom of church and of conscience independent of the state. His imaginative essay distinguishing "freedom of the church" from "freedom of religion" seems to revive a political agenda of the papal party at the time of the Papal Revolution.[154] Smith uses this papal party argument by way of an analogy of treating churches as foreign embassies. However, that extraterritorial fiction[155] is not likely to get very far, especially considering Roberts's footnote four in *Hosanna-Tabor* that rejects treating the ministerial exemption as a jurisdictional immunity.

D. The Structure of the Westphalian Peace

The structure of the Westphalian Peace was far more complex for federal republics such as the United States than it was for sovereign European nation-states. Analytically, there are three levels of effective power over religion to compare.

The first level is in the cultural unity of Western Christendom that the pope and Holy Roman Empire imposed on subsidiary provinces and monarchies. When this unity broke up in the Protestant Revolution, each subsidiary entity or state separated from the single Catholic unity, and the established religion became that of the local ruler, negotiated in Augsburg and continued in the Westphalian structure to keep the peace. Loosely led by France and Sweden, the parties to the treaties became the new first level of power, overseeing compliance with the terms of the agreements.

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[153] NUSSBAUM, *supra* note 103, at 35.

[154] Smith, *supra* note 22, at 30.

[155] *See* KAPLAN, *supra* note 3, at 187–188. The extraterritorial concept was a fiction taken from claiming chapels of foreign embassies as private places of Catholic worship as if not on the host country's territory. Nevertheless,

> neither court rulings nor treaty stipulations nor established legal principles lent protection to embassy chapels at the time of their proliferation. Extraterritoriality was an ex post facto justification, developed in no small part to rationalize the already established practice of tolerating embassy chapels. Indeed, the embassy chapel question was "the largest single factor in preparing men's minds to accept this extraordinary fiction."

Id. (quoting GARRETT MATTINGLY, RENAISSANCE DIPLOMACY 272, 280–281 (1971)).

Each sovereign state, now freed from an imposed Catholic unity became the second level power and could choose to remain Catholic or convert to a Protestant sect. It could collect taxes to pay its own clergy or to build its churches without interference from pope or emperor.

The third or lowest level of power gave religious dissidents the freedom to practice their own religion within the realm of the sovereign's church. It is this third level that distinguishes the structure of Westphalia from that of the Peace of Augsburg, which did not provide any protection of religious freedom or church other than that of the established religion in the sovereign territory. Under the Peace of Westphalia, Lutherans, Calvinists, and Catholics were given rights, and other dissident sects and Jews were accommodated by a cultural fiction.[156] They would not have to convert or leave, as heretics would under the Peace of Augsburg. Any worship in private or in a dissident church that was tolerated under the Augsburg peace was a ruler's indulgence, but under the terms of the Westphalian Peace it was a matter of a limited right.

Even in England, where the Westphalian rights of religious freedom were not law, Parliament on its own was enacting protections for religious liberties. Commenting on the Toleration Act of 1689 then before Parliament, John Locke wrote to a Dutch friend:

> In Parliament the subject of toleration is now discussed under two forms, "comprehension" and "indulgence." By the first it is proposed to enlarge the bounds of the church so that by the abolition of some ceremonies, many [people] may be induced to conform. By the other is designed [sic] the toleration of those who are either unwilling or unable to unite with the Church of England, even on the proposed conditions.[157]

The first enlarged the church tent to attract a variety of different beliefs to membership in a single church. The second accepted the existence of multiple churches in tents of their own.

VII. RELIGIOUS FREEDOM INTO THE FUTURE

A. Locating Hosanna-Tabor in Historical Structure

In the United States Constitution, the first or highest structural level is in the federal government's lack of power to affect religion one way or another, reinforced by the "Congress shall make no law" clause of the First

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[156] *See* KAPLAN, *supra* note 3, at 195.

[157] AMAR, *supra* note 19, at 132–33 (quoting MAURICE CRANSTON, JOHN LOCKE: A BIOGRAPHY 314 (1957)).

Amendment. As in the Westphalian treaties, the second and third levels of power and freedom are local, as Amar points out.[150] The apt historical analogy from the treaties of Westphalia lies in disabling the emperor's coercive power (like Congress's disability) over a local ruler's own religion (like a state's establishment) within the loosely federal Holy Roman Empire (like the U. S. federal union).

Since each state of the federal union had power, analogous to that of a European sovereign, to establish an official Christian church, the state might also, according to Leonard Levy, "indulge" religious dissidents or coerce them to join or support an established church by taxes.[158] A number of newly independent American states chose to have multiple establishments supporting various sects through taxes or even compulsory attendance before the Constitution was framed. Only a few years earlier in 1784, Madison's argument against an Assessment Bill to support religious education in Virginia occurred at this second level.[159] The focus of that debate, the coercion of religious conscience, introduced popular sovereignty, a problem for Madison. A popular Anglican majority in place of the King of England might coerce the payment of taxes from dissidents in other sects and even require compulsory attendance.

While "[t]he American experience with establishments of religion was unknown to eighteenth-century Europe," the six states that did maintain establishments at the time the Bill of Rights was drafted "had multiple or general establishments of religion."[160] That had come to mean mainly government financial support for religion generally without preference to any church.[161]

The power of post-Revolution American states regarding the establishment of a state religion, however, is comparable to that of post-Reformation European states only within the structure of the Peace of Augsburg, where a ruler has absolute choice. It is true that the Peace of Westphalia continued the choice in Europe, but it was no longer absolute. Treaty provisions containing the words "free exercise of their religion" first appear in writing to limit the sovereign's power. While dissidents might have been "indulged" in practice in Europe (and in the European-type establishments a few American states chose), the freedom of Americans to worship or not, as their consciences chose, reflected more of the spirit of the Westphalian provisions than the stricter Augsburg structure of convert or leave.

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[158] LEVY, BILL OF RIGHTS, *supra* note 103, at 90.

[159] JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785).

[160] LEVY, BILL OF RIGHTS, *supra* note 103, at 92.

[161] *Id.*

Religious freedom in America is exercised by right at the third structural level, at the locus of free exercise rights similar to those granted to Lutherans, Calvinists, and reformed sects in the Peace of Westphalia, not only as limits on the sovereign monarchs but also as positive freedoms. If the Virginia House of Burgesses (at the second structural level) had chosen to collect taxes to benefit the Anglican Church and some others as well, the measure would have violated the individual's inalienable liberty of conscience, as Madison argued. The dominant majority would be limited by preexisting "natural rights" (perhaps recognized in a state's Bill of Rights).

Originally, the national government at the highest structural level would have had no power to interfere with Virginia's choice at that secondary level. After the Fourteenth Amendment incorporated the First Amendment as against the states, however, neither the states nor the national government could abridge either the Free Exercise Clause or, to some extent, the anomalous clause respecting an establishment of religion. Nor, after *Hosanna-Tabor*, can they interfere today with internal ecclesiastical appointments inside any sect.[162] These third-level spheres of positive church freedom, at the lowest structural level, would include rabbinical or Islamic appointments, as well as those in Hindu or Buddhist groups and, arguably, new age religions.[163]

James Madison's argument in the Virginia House of Burgesses brought him face-to-face with popular sovereignty.[164] The question in a republic, Madison understood, was that dissidents needed protection from a potentially coercive democratic majority voting to impose values from the dominant religious or other culture. Madison's first draft of the Bill of Rights later introduced in Congress would have limited the states as well as the federal government, but drafting changes reintroduced the idea that the national government would have no power concerning religion. The Fourteenth Amendment changed that structure. It gave explicit authority to Congress to enforce its provisions that now included what Madison originally had proposed as a limitation in the Bill of Rights. But that enforcement power now also carried with it a danger that a Congressional majority would have power it did not have originally to impose on a religious minority the religious or secular values of the dominant national culture. Hence, the Supreme Court has as-

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[162] *See* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, No. 10–553, slip op. at 1–2 (Jan. 11, 2012) (Alito, S., dissenting) (arguing that the ministerial exception applies functionally for all religious groups such as Catholics, Jews, Muslims, Hindus, or Buddhists, not just Protestant denominations, since "virtually every religion in the world is represented in the population of the United States").

[163] *Id.*

[164] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 312–16 (1996).

sumed additional national judicial powers at the first or highest structural level, as guardian of the religious minority against a dominant majority. It is at this point in structural evolution that *Hossana-Tabor v. EEOC* should be understood best.

Roberts's opinion thus recognizes a category for protecting positive church freedoms against a popular majority from both the national Congress and the states, whose laws—though valid, neutral, and generally applicable—intrude upon these positive religious freedoms:

> Seeking to escape the control of the national church, the Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship. . . . Colonists in the South, in contrast, brought the Church of England with them. But even they sometimes chafed at the control exercised by the Crown and its representatives over religious offices. . . . It was against this background that the First Amendment was adopted. Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. . . . By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.[165]

The opinion also makes clear in footnote four that the ministerial exception to generally applicable legislation is an affirmative defense to a law suit alleging employment discrimination, not a question of power to hear the case, though the main text seems to leave the question open:

> We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That is because the issue presented by the exception is "whether the allegations the plaintiff makes entitle him to relief," not whether the court has "power to hear [the] case."[166]

To summarize, this case mirrors the tension between the church and secular rulers when power over inner ecclesiastical appointments first shifted from the kings to the Pope after the Papal Revolution, then shifted back to sovereign rulers during the Protestant Revolution. The Court asserts su-

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[165] *Hosanna-Tabor*, No. 10–553, slip op. at 7–8.

[166] *Id.* at 20 n.4.

preme judicial power at the highest level of both the Augsburg and Westphalia structures when it defines the boundaries between church and state at all levels. The opinion seems also to suggest a sphere of special solicitude for church autonomy beyond ecclesiastical appointments that may need judicial protection and supervision given the American multiplicity of sects and religious organizations that stand in contrast to European traditions.[167]

B. Special Solicitude for Church Freedom of Conscience

In *Hosanna-Tabor*, the EEOC and Administration argued that the First Amendment freedom of association is adequate to protect the churches' freedom in employment discrimination disputes on a basis of equality with the secular freedom of association under the privacy theory of the Jaycees case.[168] Chief Justice Roberts dismissed that argument as untenable: "That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[169]

How far should this special solicitude be extended in the future? Assuming the validity of a generally applicable law, do the Religion Clauses prohibit a positive federal mandate to require religious organizations to provide employee benefits that conflict with church doctrine on matters of conscience? The American Catholic bishops, for example, oppose as violating church freedom of religion any generally applicable regulations requiring church schools, hospitals, and social services agencies to carry employee health insurance benefits with birth control and sterilization coverage in conflict with church doctrine.[170] Now that the Court has upheld the validity of the Affordable

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[167] *See* LEVY, BILL OF RIGHTS, *supra* note 103, at 101–02; *see also* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 5–11 (2d ed. 1994).

[168] Roberts v. United States Jaycees, 468 U. S. 609, 622 (1984).

[169] *Hosanna-Tabor*, No. 10–553, slip op. at 14.

[170] *See* Ross Douthat, *Government and Its Rivals*, N.Y. TIMES, Jan. 28, 2012, http://www.nytimes.com/2012/01/29/opinion/sunday/douthat-government-and-its-rivals.html?ref=opinion (a reader responds: "If people choose to be part of the Catholic church and to follow 'its teachings about condoms and birth control, that is their right. But the Church does not have the right to force the general public to accept these teachings by denying people medical services protected by law and accepted by the vast, vast majority of the population (including most Catholics)"). *See also* Denise Grady, *Ruling on Conception Draws Battle Lines in Catholic College*, N.Y. TIMES, Jan. 29, 2012, http://www.nytimes.com/2012/01/30/health/policy/law-fuels-contraception-controversy-on-catholic-campuses.html?_r=1hpw; Peter Berger, *Contraception and the Culture War*, AM. INTEREST (Feb. 22, 2012), http://blogs.the-american-interest.com/berger/2012/02/22/contraception-and-the-culture-war/.

Health Care Act under the taxing power,[171] would such regulations abridge the Church's liberty of conscience under the Religion Clauses?[172]

If no accommodation can be reached and the issue comes before the Supreme Court, might a historical connection to the Peace of Westphalia provisions on free exercise of religion be of any relevance? These issues of conflict between church and state persist, as shown by our fascination with Thomas Becket during the Papal Revolution and with Sir Thomas More during the Reformation. By historical analogy, we might view special solicitude as a return to the medieval immunity of the sovereign church and its functions from the jurisdiction of kings in their temporal realms. Might the liberty of religion exceptions in the treaty be precedent for an independent sphere of inner freedom of church?

So far, the Court has applied the Religion Clauses narrowly. Perhaps any special solicitude for churches found in the treaties that ended the religious wars at a time when the first settlers were coming to America from Europe will take hold for argument. Steven Smith has pointed out the problem with justifying special solicitude for religious freedom.[173] He has a better solution: "Various authors have described the evolution of this commitment following the Protestant Reformation and in the early American Republic. For our purposes, the key point is that freedom of conscience extended, and adopted the theological and jurisdictional logic of, freedom of the church."[174] And that theological and jurisdictional logic, in his view, follows from the medieval Gregorian Revolution.[175]

Defining "religion" is implicated as well in any special solicitude for churches, for liberty of conscience does not need a hierarchy or ministers or

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[171] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ____, 132 S. Ct. 2566 (2012).

[172] *See* BRIAN LEITER, WHY TOLERATE RELIGION? 100–33 (2013) (arguing that selective application of the liberty of religious conscience itself for a special exemption to an otherwise valid and neutral law promoting the general welfare is not morally defensible). Also to be considered is Emp't Div., Dep't. of Human Res. v. Smith, 494 U.S. 872 (1990) (upholding denial of unemployment benefits when fired for ingesting peyote, a crime under Oregon law, though used for sacramental purposes, because the "right of free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)"). The Court distinguished *Smith* from *Hosanna-Tabor*, a suit for retaliation for dismissal of a teacher with ministerial duties. *Hosanna-Tabor* amounted to "government interference with an internal church decision that affects the faith and mission of the church itself," where *Smith* affects only external conduct of an employee.

[173] Steven D. Smith, *The Pluralist Predicament: Contemporary Theorizing in the Law of Religious Freedom*, 10 LEGAL THEORY 51 (2004) (explaining that why the free exercise of religion deserves special constitutional protection is a hard question, for which theorists have thus far furnished no very compelling answer).

[174] *See* Smith, *supra* note 22.

[175] *See supra* notes 40–42 and accompanying text.

teachers to sustain it. Michael McConnell, however, maintains that the framers of the First Amendment's language chose to use the words "free exercise of religion" instead of "liberty of conscience" alongside "respecting an establishment" to avoid treating a secular conscience with the same respect as a religious conscience. He argues that the words "free exercise of religion" were used for the first time in drafting the First Amendment to reflect that intention.[176] But we now know that similar words first appeared in the Westphalian Peace Treaty of 1648 as an exemption from compelling worship at an established church.

Yet to be explored is whether there is any link between the great medieval thinkers who created a separate spiritual jurisdiction for an inner church of conscience and the philosophers and theologians who assembled in the Congress of Westphalia and might have suggested ideas and words to preserve that heritage in the treaties.

VIII. CONCLUSION

Historical circumstances surrounding the end of the Thirty Years' War in Europe tell an often forgotten lesson for understanding why the merger of an organized church and a state with a monopoly of coercive power threatens the general security at any structural level. For most of human history, religious and secular powers have collaborated to govern human affairs directly and indirectly. Only recently has separation proved the better path—within the last 300 years. "The point of separating church and state in the modern regimes is to deny political power to all religious authorities, on the realistic assumption that all of them are at least potentially intolerant."[177]

To impose secular values on religious consciences with deep roots in human experience also repeats religious intolerance.[178] The American experience that began with migrations during the Protestant Reformation in Europe in part for reasons of liberty of conscience now includes a multiplicity of sects, churches, and individual or group beliefs and non-beliefs, all protected, we think, by the Religion Clauses in the Constitution. A saying of Berdyaev, the Russian mystic, quoted by Charles Taylor, reminds us that the secular may be sacred, too: "Knowledge, morality, art, government and the economy

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[176] McConnell, *supra* note 20, at 1468–69; *but see* Feldman, *supra* note 95, at 426 ("[B]roaden conscience to include secular matters of deep belief, and the Lockean distinction between the sphere of the church and that of the state evaporates.").

[177] WALZER, *supra* note 23, at 81.

[178] *See generally* CHARLES TAYLOR, A SECULAR AGE 503–35 (2007).

should become religious, but freely and from inside, not by compulsion from outside."[179]

A fresh look at the Peace of Westphalia brings the idea of "liberty of free exercise of religion" or the liberty of conscience into another new era, "just at the beginning of a new age of religious searching, whose outcome no one can foresee."[180]

Liberty of conscience is an ode to the life-long work of Burns Weston. Long ago he knew how obsolete the Westphalian public order system had become in coping with our contemporary global problems, whether they be nuclear weaponry, ecological change, free market global capitalism, or international peace and security. He has worked on every one of these major problems. We are now seeing the emergence of overlapping forms of global public order systems, including structures of global neo-feudalism and communal forms of subsidiarity. Still, we must not forget the lessons about intolerance and the general security that we have learned from the religious and ideological wars of the past five hundred years.

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[179] *Id.* at 535

[180] *Id.*